Supreme Court, U.S.
FILED

No. 00 52 JUL 10 2000

OFFICE OF THE CLERK

In The
Supreme Court Of The United States

GOLD KIST INC. AND TEAMSTERS and
CHAUFFEURS UNION, LOCAL 612,
Petitioners,

v.

JIMMY HOOPER, ROBERT MCELRATH,
EZRA SANFORD, FRANK TRAVIS, FRED NICHOLS,
TROY MARCHBANKS, STEVE TURNER,
and JIMMY UPTAIN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

D. Christopher Lauderdale
(*Counsel of Record*)
Haynsworth Baldwin Johnson & Greaves LLC
P.O. Box 10888
Greenville, SC 29603
864.271.7410
Counsel for Petitioner Gold Kist Inc.

39pp

QUESTIONS PRESENTED

1. Whether a group of feed mill employees represented by a union may state a claim for breach of a collective bargaining agreement based solely on the existence of a collectively bargained ancillary agreement that provides potential additional compensation to a separate group of truck drivers within the same bargaining unit.

2. Whether a group of feed mill employees may state a claim for breach of the duty of fair representation based solely on the union's negotiation of an agreement to continue a longstanding incentive bonus for truck drivers where, after good-faith bargaining, the union was unsuccessful in its attempt to obtain, through negotiation, a similar incentive bonus for feed mill employees.

3. Whether employees are required to exhaust their contractual grievance and arbitration remedies before asserting claims for breach of a collective bargaining agreement upon which a hybrid Section 301/duty of fair representation claim is based where such claims for breach of the collective bargaining agreement are based on a collectively bargained ancillary agreement that provides potential additional compensation to a separate group of employees within the bargaining unit.

PARTIES TO THE PROCEEDING

The parties before this Court are those set forth in the caption.[1]

---

[1] Gold Kist Inc., a Georgia corporation, is an agricultural cooperative of 31,000 farmers. Subsidiaries of Gold Kist Inc. include Agratech Seeds Inc.; Agratrade Financing, Inc.; Agvestments, Inc.; Carolina Golden Products Company, Inc.; Commerce Ventures, LLC; Cross Equipment Company, Inc.; Dixico Pet Food, Inc.; GC Properties; GK/LOL, LLC; GK Pecans, Inc.; GK Finance Corporation; GKX, Inc.; and Luker Inc. Gold Kist owns a 33 percent stake in Golden Peanut Company through its partnership with Archer Daniels Midland and Alimenta Processing. Gold Kist owns a 25 percent stake in Young Pecan Company. Gold Kist also owns a stake in Scott G. Williams LLC. There are no parent companies or other non-wholly-owned subsidiaries.

TABLE OF CONTENTS

Questions Presented i
Parties to the Proceeding ii
Table of Contents iii
Appendices iv
Table of Authorities—Cases vi
Table of Authorities—Statutes ix
Table of Authorities—Other ix
Opinions Below 1
Statement of Jurisdiction 1
Relevant Statutory Provisions 1
Statement of the Case 1
History of incentive programs at Jasper feed mill .. 2
1998 contract negotiations 3
Proceedings in the district court 4
The court of appeals proceedings 7
Reasons for Granting Writ 8
I. The Eleventh Circuit's Decision That Respondents Have Alleged Facts Sufficient To State A Claim For Breach Of Contract Is In Conflict With The National Labor Relations Act As Well As Decisions Of This Court And Of Other Courts Of Appeals 9
II. The Eleventh Circuit's Decision That Respondents Have Alleged Facts Sufficient To Sustain A Claim For Breach Of The Union's Duty Of Fair Representation Is Contrary To Decisions Of This Court And Other Courts Of Appeals 20

III. Respondents Have Failed To Fulfill The Procedural Requirements Of A Hybrid Section 301/ Duty Of Fair Representation Case Because They Failed To Exhaust Their Contractual Remedies .. 25
Conclusion 30

TABLE OF AUTHORITIES

Cases:

Air Line Pilots Association, International v. O'Neill, 499 U.S. 65 (1991) 8, 20, 21
Appalachian Shale Products, 121 N.L.R.B. 1160 (1958) 17
Beriault v. Local 40, Super Cargoes & Checkers, 501 F.2d 258 (9th Cir. 1974) 26
Capitol-Husting Co. v. NLRB, 671 F.2d 237 (7th Cir. 1982) 18-19
Cappa v. Wiseman, 659 F.2d 957 (9th Cir. 1981) 19
Central States Southeast & Southwest Areas Pension Fund v. Kraftco, Inc., 799 F.2d 1098 (6th Cir. 1986) 17
Confederated Independent Unions v. Rockwell-Standard Co., 465 F.2d 1137 (3d Cir. 1972) 17
Conran v. Great Atlantic & Pacific Tea Co., 499 F. Supp. 727 (E.D. Pa. 1980) 17-18
Del Costello v. IBT, 462 U.S. 151 (1983) 9
Edward S. Quirk Co., 330 N.L.R.B. No. 137, 2000-01 NLRB Dec. (CCH) ¶ 15424 (2000) 12
Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975) .. 14-15
Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) 8, 20-21, 21-22
Goodin v. Clinchfield Railroad Co., 229 F.2d 578 (6th Cir. 1956) 8, 23
Griffin v. Air Line Pilots Association, International, 32 F.3d 1079 (7th Cir. 1994) .. 8, 22-23
Hamilton Foundry & Machine Co. v. International Molders & Foundry Workers Union, 193 F.2d 209 (6th Cir. 1951) 19

Hayes v. Reynolds Metals Co.,
769 F.2d 1520 (11th Cir. 1985) 27
Hines v. Anchor Motor Freight, Inc.,
424 U.S. 554 (1976) 8, 9, 28, 29
Houchens Market v. NLRB,
375 F.2d 208 (6th Cir. 1967) 18
Humphrey v. Moore, 375 U.S. 335 (1964) 8, 20
IBEW v. Foust, 442 U.S. 42 (1979) 20
J.I. Case Co. v. NLRB, 321 U.S. 332 (1944) 15
Jimmy Dean Meat Co.,
227 N.L.R.B. 1527 (1977) 12
Local 174, IBT v. Lucas Flour Co.,
369 U.S. 95 (1962) 30
Local 1316, IBEW v. Superior Contractors & Associates,
608 F. Supp. 1246 (N.D. Ga. 1985) 18
Matter of Columbian Enameling & Stamping Co.,
1 N.L.R.B. 181 (1936) 13
Matter of Dallas Cartage Co.,
14 N.L.R.B. 411 (1939) 13
Matter of International Filter Co.,
1 N.L.R.B. 489 (1936) 13
Matter of J.I. Case Co., 71 N.L.R.B. No. 182 (1946) 13
Matter of Jackson Daily News, Inc.,
9 N.L.R.B. 120 (1938) 13
Matter of Register Publishing Co.,
44 N.L.R.B. 834 (1942) 13
Matter of Uhlich & Co., 26 N.L.R.B. 679 (1940) 13
Medo Photo Supply Corp. v. NLRB,
321 U.S. 678 (1944) 27
Meyerson v. Contracting Plumbers Association,
606 F. Supp. 282 (S.D.N.Y. 1985) 17

Moreau v. Local Union 247, International Brotherhood of Firemen & Oilers, 851 F.2d 516 (1st Cir. 1988) 8, 16
NLRB v. Electra-Food Machinery, Inc., 621 F.2d 956 (9th Cir. 1980) 18
NLRB v. Haberman Construction Co., 641 F.2d 351 (5th Cir. 1981) 19
NLRB v. Insurance Agents' International Union, 361 U.S. 477 (1960) 14
NLRB v. International Union of Elevator Constructors Local No. 8, 465 F.2d 974 (9th Cir. 1972) 17, 18
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 13-14
NLRB v. Seneca Environmental Products, 646 F.2d 1170 (6th Cir. 1981) 18
NLRB v. Truckdrivers, Chauffeurs & Helpers, Local Union No. 100, 532 F.2d 569 (6th Cir. 1976) 18
Parker v. Connors Steel Co., 855 F.2d 1510 (11th Cir. 1988) 8, 9, 21, 24
Rabouin v. NLRB, 195 F.2d 906 (2d Cir. 1952) 19
Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) 27, 30
Samples v. Ryder Truck Lines, Inc., 755 F.2d 881 (11th Cir. 1985) 15, 27
Spellacy v. Airline Pilots Association-International, 156 F.3d 120 (2d Cir. 1998) 7-8, 22, 23
UPS v. Mitchell, 451 U.S. 56 (1981) 9
United Health Care Services, Inc., 326 N.L.R.B. No. 144, 163 L.R.R.M. (BNA) 1061 (1998) 17
United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960) 29
Vaca v. Sipes, 386 U.S. 171 (1967) 8, 9, 20, 28

Van Leeuwen v. United States Postal Service,
628 F.2d 1093 (8th Cir. 1980) 8, 23
Watson v. IBT, 399 F.2d 875 (5th Cir. 1968) 18
Williams v. Pacific Maritime Association,
617 F.2d 1321 (5th Cir. 1980) 8, 23

Statutes:

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1291 7
29 U.S.C. § 151-169 ..... *passim*
29 U.S.C. § 158(a)(5) 1, 10
29 U.S.C. § 158(d) 1, 10, 12, 24
29 U.S.C. § 159(a) 1, 14
29 U.S.C. § 173(d) 1, 29
29 U.S.C. § 185 ..... *passim*
50 U.S.C. § 308 21

Other:

H.R. Rep. No. 245 (1947) on H.R. 3020,
80th Cong. (1947) 13-14

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS BELOW

The District Court for the Northern District of Alabama granted Gold Kist Inc. and Teamsters Local 612 summary judgment on January 21, 1999. (App. at 8a.) On February 7, 2000, the United States Court of Appeals for the Eleventh Circuit issued its decision reversing summary judgment. The decision of the Eleventh Circuit is not reported. (App. at 1a-7a.) Petitioner's timely petition for rehearing was denied on April 11. (App. at 42a.)

STATEMENT OF JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on February 7, 2000. A timely petition for rehearing was filed on February 28, 2000. On April 11, 2000, the court of appeals denied the petition for rehearing. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1) (1993).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are set forth in the Appendix at 44a-51a. These are 29 U.S.C. § 158(a)(5) (1998), 29 U.S.C. § 158(d) (1998), 29 U.S.C. § 159(a) (1998), 29 U.S.C. § 173(d) (1993), and 29 U.S.C. § 185 (1993).

STATEMENT OF THE CASE

Petitioner, Gold Kist Inc., produces and markets poultry products at various facilities located throughout the United

States. Its operations include a feed mill in Jasper, Alabama, where it manufactures chicken feed. This operation employs laborers in the feed mill department and drivers in the trucking department. (App. at 10a-11a.) Feed mill employees unload the raw ingredients from railcars and supply trucks, combine the ingredients for the manufacture of the feed, and load the feed on Gold Kist feed-haul trucks so the drivers can deliver it to chicken farms. All employees at the Jasper feed mill operation, including feed mill employees and drivers, are represented by Teamsters Local 612 ("Union"). (App. at 10a-12a.)

Employees of the feed mill have been represented by the Union since Gold Kist purchased the facility in the early 1970s. Since that time, Gold Kist and the Union have negotiated collective bargaining agreements approximately every three years. (App. at 11a & 31a.) The current labor contract is effective February 1, 1998, through January 31, 2001. (App. at 11a, 33a, & 102a.) Respondents in the present case are 8 of the 17 feed mill employees. (App. at 11a.)

A. History of incentive programs at Jasper feed mill

The facts relevant to Respondents' claims are essentially undisputed. During contract negotiations in the mid 1970s, Gold Kist and the Union orally agreed to an incentive pay plan for the drivers based on mileage and tonnage to encourage the drivers to work more efficiently and haul more feed in a shorter period of time. (App. at 13a.) Pursuant to the agreement, drivers earn the hourly rate set forth in the collective bargaining agreement or the incentive rate, whichever is higher. To date, the driver incentive plan is unwritten except for the written formulas used to calculate incentive

pay and thus determine whether a driver receives the incentive pay or the hourly rate. (App. at 13a.)

In the late 1970s, the Union proposed, and the parties agreed upon, an incentive plan for the feed mill employees. (App. at 13a.) This plan, like the incentive plan for the drivers, was an oral agreement between Gold Kist and the Union. The plan proved to be unworkable, however, and the feed mill employees were rarely able to earn incentive pay under this plan. (App. at 13a.)

Consequently, the Union proposed in negotiations for the 1980 contract that the feed mill employees receive additional pay of 10 cents an hour in place of the unsuccessful incentive plan. (App. at 13a.) Gold Kist accepted this proposal, and an agreement to that effect was ratified by the membership and has been adopted in every collective bargaining agreement since 1980. (App. at 13a.) The wage schedule of the current agreement states that "[i]n addition to rates set forth in the above wage schedule, an additional ten cents (10¢) per hour will be paid to all feed mill employees in lieu of the incentive plan." (App. at 105a.) Significantly, drivers do not receive this guaranteed hourly bonus.

The feed mill employees have continued to receive 10 cents an hour over the rate published in the wage schedules attached to each of the 1980, 1983, 1986, 1989, 1992, 1995, and 1998 collective bargaining agreements. (App. at 13a.) Throughout this same period of time, the drivers' incentive plan continued.

B. 1998 contract negotiations

During negotiations for the 1998 agreement, the Union proposed an incentive plan for feed mill employees, and the Union's proposal was thoroughly discussed. (App. at 13a.)

Although the Union's incentive plan proposal was not agreed upon, the Union was able to obtain a 30-cent hourly increase in wages for the first year of the collective bargaining agreement and additional increases in each year thereafter. (App. at 104a.) The feed mill employees, unlike the trucking department employees, also specifically received a guaranteed 10-cent-an-hour premium in lieu of an incentive pay plan.

The Union conducted a ratification vote on the contract among all employees. Thirty-one of the 32 members of the unit, including all of the Respondents, were present. Respondent Nichols, in his role as shop steward, presided over the vote count and recommended acceptance of the contract —without an incentive plan for feed mill employees. The vote was 26 employees for the contract and 5 against. (App. at 13a.) Therefore, it is uncontroverted that at least 11 of the 17 feed mill employees affirmatively voted for the proposed contract. Even though several Respondents voted for the contract on January 27, this suit was commenced on February 13, 1998.

C. Proceedings in the district court

Respondents commenced this action in the Northern District of Alabama on February 13, 1998, as a "classic hybrid" Section 301 (Labor-Management Relations Act)/ duty of fair representation action alleging that Gold Kist breached various collective bargaining agreements and that the Union breached its duty of fair representation to Respondents and other similarly situated employees under those collective bargaining agreements. (App. at 61a.) Construed most favorably for Respondents, the Amended Complaint sets forth only one alleged breach of the collective

bargaining agreement—that Gold Kist "breached" the wage provisions of the agreement by paying the drivers amounts of pay calculated via the negotiated incentive pay plan rather than the hourly rates set forth in the agreement. Considered as a whole, the Amended Complaint may arguably be read to allege that the Union breached its duty of fair representation by negotiating incentive pay for the drivers but not for the feed mill employees.

On May 8, 1998, in an opinion by District Judge William M. Acker, Jr., the court disposed of any and all claims asserted by Respondents under collective bargaining agreements prior to the 1998 agreement. (App. at 28a-29a.) Respondents did not appeal Judge Acker's partial grant of summary judgment to Gold Kist and the Union.

On January 21, 1999, District Judge Inge P. Johnson issued her memorandum opinion granting Gold Kist and the Union summary judgment. (App. at 8a-27a.) Judge Johnson's decision disposed of any and all claims alleging violations of the 1998 collective bargaining agreement. (App. at 26a.) In this opinion, the district court first addressed Respondents' claims against Gold Kist for breach of the 1998 collective bargaining agreement based on the payment of incentive pay for drivers but not for the feed mill employees (App. at 18a), stating:

> This court cannot find any logic in this argument. Assuming this court ordered the defendants to void their verbal contract and pay the truck drivers solely the hourly wage specified in the contract, the plaintiffs here would not earn any more money.
>
> . . . . No where [sic] can this court find justification for the plaintiffs' proposition that paying an em-

> ployee more than a required amount violates a contract, nor do plaintiffs cite any legal support for this novel contract interpretation. This court also cannot find any basis for the plaintiffs [sic] proposition that the verbal contract between Gold Kist and the truck drivers is contrary to the collective bargaining agreement.

(App. at 18a.) In addition, the district court held that Respondents were not damaged by any "alleged breach." (App. at 19a.) The court thoroughly analyzed the three sections of the collective bargaining agreement that Respondents alleged were breached and found that none of these provisions had been violated by Gold Kist. (App. at 19a-20a.) The court further found that the agreement with regard to incentive pay for drivers did not violate the collective bargaining agreement. (App. at 20a-21a.) Finally, the court recognized that Respondents "apparently want this court to order the defendants to renegotiate the contract that at least some of these plaintiffs voted to approve to obtain what they could not obtain through the collective bargaining process." (App. at 21a.)

The district court also found that the Union did not breach its duty of fair representation. The court characterized Respondents' claims as a "mere bald allegation that the Union somehow acted in bad faith because no incentive pay agreement was reached." (App. at 22a-23a.) The court further recognized the impossibility of Respondents' claims that the Union had breached its duty of fair representation, noting that Respondents alleged that on the one hand, the Union had knowledge of the truck driver incentive pay, and on the other hand, Gold Kist breached the contract because the Union would have negotiated for a greater rate of pay

for *all* employees if the Union had known of the driver incentive pay. (App. at 21a-22a.) The district court held alternatively that Respondents failed to exhaust their administrative remedies prior to commencing this action in the district court. (App. at 24a-26a.)

D. The court of appeals proceedings

On February 17, 1999, Respondents filed a notice of appeal with the United States Court of Appeals for the Eleventh Circuit. The court of appeals acquired jurisdiction pursuant to 28 U.S.C. § 1291 (1993).

On February 7, 2000, a majority of the court of appeals panel reversed the district court's grant of summary judgment, holding that a reasonable jury could find that Gold Kist breached the collective bargaining agreement and the Union violated its "fiduciary" duty. (App. at 4a.) More specifically, the majority concluded that a reasonable jury could find a breach of the collective bargaining agreement because Article 1, Section 5, prohibits "individual agreements between the Company [Gold Kist] and an employee in conflict with this agreement" and because Article 27, Section 11, requires that any modification be in writing. (App. at 5a.)

Judge Black dissented. (App. at 7a.) She concluded that "[e]ven assuming Gold Kist did breach the collective bargaining agreement, I do not believe a reasonable jury could conclude that the Union violated its duty of fair representation." (App. at 7a.) Judge Black found that "[a]lthough the 'side agreement' did favor the truck drivers, Appellant has not alleged any facts to show that this was the result of a breach of the duty of fair representation." (App. at 7a (citing *Spellacy v. Airline Pilots Ass'n-Int'l*, 156 F.3d 120, 129 (2d

Cir. 1998)). Finally, Judge Black noted that Respondents' "proper recourse is to be found in the collective bargaining process, not the courts." (App. at 7a.)

Petitioners now file this petition for certiorari.

REASONS FOR GRANTING WRIT

The Court should grant the writ because:

1. This case presents important questions of statutory interpretation arising under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 to 169 .

2. The Eleventh Circuit ruling directly contradicts numerous standing decisions of this Court. *See Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67 (1991); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Humphrey v. Moore*, 375 U.S. 335, 342 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

3. This case presents a conflict between the Eleventh Circuit and every other court of appeals that has addressed the issues presented. *See Spellacy v. Airline Pilots Ass'n-Int'l*, 156 F.3d 120, 127 (2d Cir. 1998); *Griffin v. Air Line Pilots Ass'n, Int'l*, 32 F.3d 1079, 1083-84 (7th Cir. 1994); *Moreau v. Local Union 247, Int'l Bhd. of Firemen & Oilers*, 851 F.2d 516, 519-20 (1st Cir. 1988); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519 (11th Cir. 1988); *Van Leeuwen v. United States Postal Serv.*, 628 F.2d 1093, 1096-97 (8th Cir. 1980); *Williams v. Pacific Maritime Ass'n*, 617 F.2d 1321, 1330 (9th Cir. 1980); *Goodin v. Clinchfield R.R. Co.*, 229 F.2d 578, 579 (6th Cir. 1956).

I.

The Eleventh Circuit's Decision That Respondents Have Alleged Facts Sufficient To State A Claim For Breach Of Contract Is In Conflict With The National Labor Relations Act As Well As Decisions Of This Court And Of Other Courts Of Appeals.

A hybrid Section 301/duty of fair representation lawsuit involves interdependent claims that (1) a company breached the collective bargaining agreement and (2) a union violated its duty of fair representation. As Judge Black recognized in her dissent, a plaintiff must prove both a breach of the collective bargaining agreement by the company and a breach of the duty of fair representation by the union in order to prevail in a hybrid Section 301/duty of fair representation action. (*See* App. at 7a (citing *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519 (11th Cir. 1988), and *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71 (1976)); *see also UPS v. Mitchell*, 451 U.S. 56, 67 (1981) (Stewart, J., concurring) ("plaintiff must prevail upon his unfair representation claim before he may even litigate the merits of his § 301 claim against the employer").

Whether a union has breached its duty of fair representation is frequently the pivotal question in a Section 301 action alleging that the employer breached a collective bargaining agreement. *See, e.g.*, *Del Costello v. IBT*, 462 U.S. 151, 164-65 (1983); *Vaca v. Sipes*, 386 U.S. 171, 183 (1967) ("question of whether a union has breached its duty of fair representation will in many cases be a critical issue in a suit under L.M.R.A. § 301 charging an employer with a breach of contract"). Of course, a viable claim for breach of

the extant collective bargaining agreement is equally essential to a hybrid Section 301/duty of fair representation claim. As the district court recognized in this case, "[U]nless Gold Kist breached the contract by paying the truck drivers more than the stated rate, there can be no breach of the duty of fair representation [by the Union]." (App. at 17a.)

Three absolute and irrefutable truths demonstrate the logical impossibility of Respondents' claims that Gold Kist has breached the collective bargaining agreement under any accepted standard for maintaining an action under Section 301:

1. It is undisputed, as is clear from the collective bargaining agreement, that Gold Kist has not *agreed* to pay mill workers any incentive bonus or pay other than that set forth in the collective bargaining agreement.
2. For Gold Kist to provide any pay to Respondents other than the pay specifically negotiated with the Union would violate the NLRA. 29 U.S.C. § 158(a)(5).
3. No court, arbitrator, or administrative agency may compel Gold Kist to agree to any proposal or make any concession in collective bargaining. 29 U.S.C. § 158(d).

Respondents have alleged no facts sufficient to sustain an action for breach of a collective bargaining agreement. Rather, their claim that Gold Kist violated the collective bargaining agreement is plainly an attempt to obtain through litigation what they could not obtain through the collective bargaining process. Respondents simply make the incredible claim that Gold Kist pays truck drivers more than the rate stated in the 1998 contract and that as a result, Respondents have somehow lost income because drivers make more

money than the contract's wage schedule enumerates. (App. at 60a-61a.) The implausibility of this claim was plainly evident to the district court: "This court cannot find any logic in this argument. Assuming this court ordered the defendants to void their verbal contract and pay the truck drivers solely the hourly wage specified in the contract, the plaintiffs here would not earn any more money." (App. at 18a.) Likewise, as the district court stated, Respondents cannot justify or cite any authority to support their "novel contract interpretation." (App. at 18a.)

There is no dispute that Respondents have received the wages and other benefits established in the agreement. They do not allege otherwise. Respondents therefore cannot establish any breach of the collective bargaining agreement and have suffered no damages. Respondents, moreover, ratified this contract without an incentive plan for feed mill employees. The current contract, like the predecessor contracts since 1980, clearly provides that "an additional ten cents (10¢) per hour will be paid to all feed mill employees *in lieu of the incentive plan.*" (App. at 105a (emphasis added).) As the contract makes clear, and as the district court found based upon undisputed facts, an incentive plan for the drivers has been established for many years through successive collective bargaining agreements. (App. at 13a & 105a.) The district court correctly observed that Respondents "apparently want this court to order the defendants to renegotiate the contract that at least some of these plaintiffs voted to approve to obtain what they could not obtain through the collective bargaining process." (App. at 21a.)

The evidence clearly establishes that Respondents receive pay in accordance with the wage schedule for the current contract, which includes a 10-cent-an-hour premium in lieu of an incentive plan. It is equally true that Respon-

dents' subjective desire to make more money does not equate to a cognizable breach of contract claim. In fact, for Gold Kist to offer Respondents any incentive bonus or other pay not agreed to by the Union as Respondents' statutory exclusive bargaining representative would violate the NLRA. *Edward S. Quirk Co.*, 330 N.L.R.B. No. 137, 2000-01 NLRB Dec. (CCH) ¶ 15424 (2000) (holding that employer unlawfully implemented an incentive plan for union-represented employees without first bargaining to agreement with the union); *Jimmy Dean Meat Co.*, 227 N.L.R.B. 1527 (1977) (same).

Section 8(d) of the NLRA further demonstrates the implausibility of Respondents' claims:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession* . . . .

29 U.S.C. § 158(d) (emphasis added). The legislative history of Section 8(d) demonstrates that this provision was enacted in direct response to decisions of the National Labor Relations Board ("NLRB" or "Board") finding that employers had violated the NLRA by refusing to agree to specific collective bargaining proposals:

> [T]he present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make. The Board has gone so far as to hold an employer's refusal to compel workers to become and remain members of unions, under so-called "closed shop" arrangements, to be evidence that the employers had not bargained "in good faith". (See *Matter of International Filter Co.*, 1 N.L.R.B. 489 (1936); *Matter of Columbian Enameling and Stamping Co.*, 1 N.L.R.B. 181 (1936); *Matter of Jackson Daily News*, 9 N.L.R.B. 120 (1938); *Matter of Uhlich and Co.*, 26 N.L.R.B. 679 (1940); *Matter of J. I. Case Co.*, 71 N.L.R.B. No. 182 (1946).)
>
> The Board has held it "unfair" for an employer to insist that he and the union settle their differences by collective bargaining, instead of submitting them to some form of "collective litigation" like arbitration (*Matter of Dallas Cartage Co.*, 14 N.L.R.B. 411 (1939); *Matter of Register Publishing Co.*, 44 N.L.R.B. 834 (1942)).

H.R. Rep. No. 245, at 19 (1947) on H.R. 3020, 80th Cong. (1947). Enacting Section 8(d), Congress made clear that it was ratifying the principles of *NLRB v. Jones & Laughlin Steel Corp*, 301 U.S. 1, 45 (1937), in which the Court observed:

> The Act does not compel agreements between employers and employees. It does not compel any

> agreement whatever. It does not prevent an employer "from refusing to make a collective contract and hiring individuals on whatever terms" the employer "may by unilateral action determine . . . ." The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel . . . .

(Footnote omitted); *see* H.R. Rep. No. 245 on H.R. 3020. The Court further observed in *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 488 (1960), that Congress "intended that the parties should have wide latitude in their negotiations, unrestricted by *any* governmental power to regulate the substantive solution of their differences." (Emphasis added.) Section 8(d) of the NLRA was specifically intended to encourage collective *bargaining*, not the "collective *litigation*" represented by this action. *See* H.R. Rep. No. 245 on H.R. 3020. In this case, there is no contention that Gold Kist did not bargain fully and in good faith in negotiating the 1998 agreement.

In light of the clear limitation of Section 8(d) on the authority of the NLRB and the courts, there is no conceivable remedy for the claim asserted by Respondents. In short, even if by some artifice of reason Respondents could establish a jury issue with respect to breach, the NLRA denies a court the authority to order Gold Kist to establish an incentive plan for feed mill employees.

The principles of majority rule and a union's exclusive representation of employees are fundamental tenets of federal labor law. 29 U.S.C. § 159(a) (1998); *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50,

62-65 (1975); *Samples v. Ryder Truck Lines, Inc.*, 755 F.2d 881, 885-86 (11th Cir. 1985) (indicating that a basic premise of unionism is the sacrifice of individual rights for collective rights). Nevertheless, the court of appeals majority relied on Article 1, paragraph 5, of the current collective bargaining agreement as support for a conclusion that the incentive pay plan for drivers in some way breached that agreement. (App. at 5a.) Paragraph 5 states: "There shall be no individual agreements between the Company and an employee in conflict with this Agreement." (App. at 68a.) The majority's reliance on this provision demonstrates a clear misunderstanding of basic labor law.

The clause on which the court of appeals relied is a portion of the recognition article, which is a standard provision of a collective bargaining agreement. Paragraph 5 is simply a contractual provision reflecting the mandate of the NLRA that individual contracts with *employees* in a bargaining unit are prohibited because individual contracts conflict with the collective rights established by the NLRA, 29 U.S.C. §§ 151 to 169. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337-38 (1944). The principle of exclusive representation prohibits individual contracts with employees and prohibits a company from bargaining with employees individually. *Emporium Capwell*, 420 U.S. at 62-65. Under the NLRA, once it is recognized by the employer or certified by the NLRB, a union is the exclusive bargaining representative of the employees. Article 1, paragraph 5, does not prohibit an agreement between *the Union* and Gold Kist affecting a *group of employees*, such as the drivers; it prohibits agreements between Gold Kist and *individual employees*. The agreement between the Union and Gold Kist for an incentive plan for drivers is therefore not a violation of the collective bargaining agreement. This lawsuit, in contrast, is an effort by Re-

spondents to undermine the exclusivity principle and the agreements reached between Gold Kist and the Union in the legally mandated collective bargaining process.

The Eleventh Circuit's opinion is in direct conflict with the decision of the First Circuit in *Moreau v. Local Union 247, International Brotherhood of Firemen & Oilers*, 851 F.2d 516 (1st Cir. 1988). There, a local union negotiated a "side agreement" to a ratified collective bargaining agreement that restricted certain employee transfers within the bargaining unit. *Id.* at 517. The side agreement was agreed to by the bargaining representative and the company and set forth in a written, but unsigned, memorandum prepared by the company. *Id.* at 517-18. The side agreement directly contradicted a provision of the collective bargaining agreement requiring that job vacancies be filled according to seniority. *Id.* at 517. An employee who was denied a requested transfer because of the terms of the side agreement brought a Section 301/duty of fair representation claim against the employer for breach of the agreement and against the union for declining to process his grievance. *Id.* at 518.

The First Circuit affirmed the district court's grant of summary judgment to the employer and the union. The court first noted that "the local unions could void old side agreements and negotiate new side agreements regarding matters of local concern on an as needed basis." *Id.* at 519. The court found that "the side agreement validly became a part of the collective bargaining agreement, and the Company committed no breach in denying . . . the transfer." *Id.* The court further found that because the union had apparent authority to negotiate the side agreement, the side agreement was valid and binding even in the absence of membership ratification. *Id.* at 520. The court rejected an argument that

the local union lacked authority to bind the international union to a side agreement under the terms of the union constitution. *Id.* Consequently, the court found that the union did not breach its duty of fair representation in refusing to pursue the affected employee's grievance. *Id.*

In the present case, there is similarly no basis for concluding that the Union lacked authority to negotiate a binding side agreement supplementing, rather than contradicting, the terms of the 1998 collective bargaining agreement. This is particularly true since the supplemental agreement for drivers' incentive pay was merely a continuation of a long-standing practice to which the Union and the Company had agreed for more than 20 years. *Central States Southeast & Southwest Areas Pension Fund v. Kraftco, Inc.*, 799 F.2d 1098, 1113 (6th Cir. 1986) (holding that ratification of a side agreement was unnecessary because of general practice of negotiating side agreements without ratification); *NLRB v. International Union of Elevator Constructors Local No. 8*, 465 F.2d 974, 975 n.1 (9th Cir. 1972) (holding that contract was valid without membership ratification when there was an "established history of entering into bargaining agreements without such ratification"). Federal labor law imposes no requirement that agreements negotiated by a statutory bargaining representative be ratified or otherwise approved by membership to be valid. *See, e.g., Appalachian Shale Prods.*, 121 N.L.R.B. 1160 (1958) (holding that even though collective bargaining agreement was not ratified, it operated as a bar to a decertification petition filed by employees); *United Health Care Servs., Inc.*, 326 N.L.R.B. No. 144, 163 L.R.R.M. (BNA) 1061 (1998) (same); *see also Confederated Indep. Unions v. Rockwell-Standard Co.*, 465 F.2d 1137, 1140 (3d Cir. 1972); *Meyerson v. Contracting Plumbers Ass'n*, 606 F. Supp. 282 (S.D.N.Y. 1985); *Conran*

v. Great Atl. & Pac. Tea Co., 499 F. Supp. 727, 730 (E.D. Pa. 1980). In fact, it is an unfair labor practice under the NLRA for a union or an employer to insist upon ratification once the parties have reached an otherwise valid collective bargaining agreement. *NLRB v. Seneca Envtl. Prods.*, 646 F.2d 1170 (6th Cir. 1981); *NLRB v. Electra-Food Mach., Inc.*, 621 F.2d 956, 958 (9th Cir. 1980); *NLRB v. Truck-drivers, Chauffeurs & Helpers, Local Union No. 100*, 532 F.2d 569 (6th Cir. 1976); *Elevator Constructors Local 8*, 465 F.2d at 974; *Houchens Mkt. v. NLRB*, 375 F.2d 208 (6th Cir. 1967). Rather, as the statutory bargaining representative, the Union has full authority under Section 9 of the NLRA to negotiate a binding collective bargaining agreement and any side agreement or modification to a collective bargaining agreement, with or without membership approval.

The court of appeals found that the negotiation of a verbal agreement with the Union regarding an incentive plan for drivers could support Respondents' claim for breach of the 1998 agreement. This finding ignores basic labor law. The law is clear that a union and an employer may enter into an agreement that "modif[ies], supplement[s], or amend[s] the collective bargaining contract." *Watson v. IBT*, 399 F.2d 875, 879 (5th Cir. 1968) (citations omitted); *see also Local 1316, IBEW v. Superior Contractors & Assocs.*, 608 F. Supp. 1246, 1250 (N.D. Ga. 1985) (citing *Watson* with approval). This flexibility between a union and an employer reflects a "mutual interdependence" of the parties in "filling in the details" of the collective bargaining agreement. *See Watson*, 399 F.2d at 879. Moreover, since the inception of the NLRA, the NLRB and the courts have recognized and enforced both oral and written collective bargaining agreements. *Capitol-Husting Co. v. NLRB*, 671 F.2d 237, 243

(7th Cir. 1982); *Cappa v. Wiseman*, 659 F.2d 957, 960 (9th Cir. 1981); *NLRB v. Haberman Constr. Co.*, 641 F.2d 351, 355-56 (5th Cir. 1981); *Rabouin v. NLRB*, 195 F.2d 906, 910 (2d Cir. 1952); *Hamilton Foundry & Mach. Co. v. International Molders & Foundry Workers Union*, 193 F.2d 209, 214 (6th Cir. 1951).

It is undisputed that Gold Kist and the Union negotiated and entered into an agreement for a driver incentive plan. It is also undisputed that this incentive plan had been in place for more than 20 years prior to 1998. Likewise, construing the facts in Respondents' favor, Gold Kist and the Union entered into this side agreement to continue the driver incentive plan *after* the 1998 contract was signed. Side agreements between Gold Kist and Respondents' exclusive bargaining representative are not prohibited by the collective bargaining agreement. (App. at 68a.) In fact, the stated "purpose" of the contract is to provide flexibility to Gold Kist and the Union in "increas[ing] the effectiveness of the working and economic relationships" between the parties. (App. at 68a.) Most important, the contract clearly and unequivocally states that feed mill employees, including Respondents, do not receive incentive pay, but instead receive an hourly premium. (App. at 105a.)

It is undisputed that Respondents have received all compensation to which they are entitled under the collective bargaining agreement. It is further clear under the NLRA that Gold Kist could not be compelled to institute an incentive plan or any other form of compensation. Gold Kist did not, therefore, breach the contract by entering into a supplemental agreement with the Union regarding a driver incentive program.

II.

The Eleventh Circuit's Decision That Respondents Have Alleged Facts Sufficient To Sustain A Claim For Breach Of The Union's Duty Of Fair Representation Is Contrary To Decisions Of This Court And Other Courts Of Appeals.

The Union's failure to obtain an incentive plan for feed mill employees while entering into an agreement with Gold Kist that drivers may be paid the greater of amounts earned under the incentive plan or the hourly wage schedule contained in the contract did not violate the Union's duty of fair representation to the feed mill employees.

It is a well-established principle of labor law that a union has a duty to fairly represent all the employees subject to a collective bargaining agreement. *See, e.g., Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65 (1991). Likewise, the union's duty of fair representation extends to both negotiation of collective bargaining agreements and the enforcement and administration of collective bargaining agreements. *See IBEW v. Foust*, 442 U.S. 42 (1979). A union's duty of fair representation requires it "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967) (citing *Humphrey v. Moore*, 375 U.S. 335, 342 (1964)). However, a union's actions are arbitrary and a breach of its fair representation duty "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside of a 'wide range of reasonableness' as to be irrational." *Air Line Pilots*, 499 U.S. at 67 (quoting *Ford Motor Co. v. Huffman*, 345

U.S. 330, 338 (1953)). Therefore, a union is vested with considerable discretion in fulfilling its statutory obligation to fairly represent employees in a bargaining unit.

A court's role in examining a union's performance of its duty of representation is "highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." *Air Line Pilots,* 499 U.S. at 78. In fact, the union is vested with such a "wide range of reasonableness" that courts have held that mere negligence by a union does not amount to a breach of the union's duty of fair representation. *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519 (11th Cir. 1988).

The Court's decision in *Huffman*, 345 U.S. 330, conclusively demonstrates that the allegations found in the Amended Complaint fail to establish a claim for breach of the duty of fair representation by the Union in negotiating the driver incentive plan. In *Huffman,* the union and employer agreed to afford seniority credit for both pre- and postemployment military service. The Selective Training and Service Act of 1940, 50 U.S.C. § 308, required seniority credit only for postemployment military service. As a result of the agreement to credit preemployment military service for seniority purposes, employees with credit for postemployment service suffered a reduction in seniority as compared to other employees. *Id.* at 331-32. The Court sustained summary judgment for the union and the employer, finding no violation of the union's duty of fair representation. The Court observed:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not

> make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.
>
> Compromises on a temporary basis, with a view to long range advantages, are natural incidents of negotiation. Differences in wages, hours and conditions of employment reflect countless variables. . . . Variations acceptable in the discretion of bargaining representatives, however, may well include differences based upon such matters as the . . . nature of the work [and] the time at which it is done . . . .

Huffman, 345 U.S. at 338-39. The Eleventh Circuit's decision in the instant case substantially departs from the established standards for evaluating a union's fulfillment of its duty to represent employees fairly.

The Eleventh Circuit majority opinion in this case is also in direct conflict with a recent decision by the Second Circuit. In *Spellacy v. Airline Pilots Association-International*, 156 F.3d 120, 127 (2d Cir. 1998), the court held that a union's position that a contract's seniority provision did not apply to the transfer of pilots from a financially moribund airline to a second airline in a partial-asset purchase was not so unreasonable as to constitute a breach of the duty of fair representation. Likewise, the *Spellacy* court recognized that "[a] union's reasoned decision to support the interests of one group of employees over the competing interests of another group does not constitute arbitrary conduct." *Id.* at 129 (citations omitted); *see also Griffin v. Air Line Pilots Ass'n, Int'l*,

32 F.3d 1079 (7th Cir. 1994); *Van Leeuwen v. United States Postal Serv.*, 628 F.2d 1093, 1096-97 (8th Cir. 1980); *Williams v. Pacific Maritime Ass'n*, 617 F.2d 1321, 1330 (5th Cir. 1980); *Goodin v. Clinchfield R.R. Co.*, 229 F.2d 578, 579 (6th Cir. 1956).

Like the union in *Spellacy*, the Union here did not interpret the current contract to preclude the drivers from receiving incentive pay. Moreover, nothing in the contract prohibits a group of employees from making more than the prescribed minimum hourly rate set forth in the contract. Because the drivers and feed mill employees perform different functions and perform these functions in entirely different circumstances, it was within the realm of the Union's reasoned decision-making to continue to allow Gold Kist to pay drivers the greater of the amount earned under incentive pay or the hourly wage rates contained in the contract. The Union's well-reasoned decision that the contract's wage schedule constitutes a minimum wage and that Gold Kist could pay the drivers on an incentive basis in excess of the schedule does not constitute a breach of the duty of fair representation. There is simply no evidence that the Union breached its duty of fair representation to the feed mill employees. Given the long history of the compensation scheme for the Jasper Feed Mill, any contention that the Union's negotiation of such a compensation scheme is arbitrary, discriminatory, or in bad faith is untenable and clearly fails to meet the standard established by the Court for stating a claim for breach of the Union's duty of fair representation.

The Union properly discharged its duty of fair representation to the feed mill employees. The facts are uncontroverted that in bargaining sessions for the 1998 contract, the Union and Gold Kist negotiated over the Union's proposal for the establishment of a feed mill employee incentive plan.

See Parker, 855 F.2d at 1520 n.7 (company's duty to bargain in good faith does not require that it agree to unacceptable proposals). Although the Union was unsuccessful in obtaining an incentive plan for the feed mill employees, those employees did receive a wage increase for each year of the 1998 contract.

As discussed above, Section 8(d) of the NLRA makes clear that in collective bargaining negotiations, no party may be compelled to agree to a proposal or make a concession in bargaining. 29 U.S.C. § 158(d). In light of this restriction on the authority of courts, arbitrators, and the NLRB, it cannot be seriously contended that the Union breached its duty of fair representation by failing to obtain Gold Kist's agreement to a new incentive plan for the feed mill employees. This is particularly true where the Union proposed such a plan and discussed the proposal at length during negotiations. Essentially, Respondents allege that the Union should be liable for its failure to exercise authority that the NLRA specifically denies to the courts and the NLRB. Had the Union arbitrarily refused to seek through negotiation an incentive plan for feed mill employees, Respondents' claims would have somewhat more force. That the Union actually proposed and attempted to secure Gold Kist's agreement to incentive pay for feed mill employees demonstrates the absence of any arbitrariness in its representation of Respondents. Additionally, the Union achieved for feed mill employees, through negotiation, an additional 10 cents an hour in lieu of incentive pay.

Under the reasoning of the court of appeals majority, in order to state a claim for breach of the Union's duty of fair representation, a litigant need be required to show only that the Union negotiated an agreement that favors one group of represented employees more than another. Inasmuch as most

collective bargaining agreements provide for different pay rates for the various employee classifications covered, virtually every union, under the ruling of the Eleventh Circuit, will be subject to litigation and claims for breach of the duty of fair representation for virtually any agreement it has negotiated. This absurd result illustrates the importance of the questions presented by this writ and the need to address these questions at the summary judgment stage of the case.

III.

Respondents Have Failed To Fulfill The Procedural Requirements Of A Hybrid Section 301/ Duty Of Fair Representation Case Because They Failed To Exhaust Their Contractual Remedies.[1]

The Amended Complaint that initiated this action sets forth *one* alleged breach of the collective bargaining agreement—that Gold Kist, by agreeing to a driver incentive plan, paid drivers more than the contractual wage rate. (App. at 60a-61a.) The Eleventh Circuit additionally found that a jury could conclude that the agreement had been breached because Gold Kist and the Union agreed to an *oral* side agreement for incentive pay whereas the agreement provides that modifications must be made in writing, and because the agreement prohibits "individual agreements"

---

[1] As discussed in Section I above, Respondents have failed as a matter of law to allege facts sufficient to sustain a claim for breach of the collective bargaining agreement. Even if Respondents could maintain an action for breach based on the facts alleged, their failure to exhaust their contractual remedies would bar this action.

between Gold Kist and "an employee." (App. at 5a.) The Amended Complaint may also be arguably read to allege a claim that the Union, in negotiating a side agreement that favored drivers with an incentive plan while not obtaining such an incentive plan for feed mill employees, violated its duty of fair representation.

Any claim based on the Union's alleged failure to fulfill its duty of fair representation in negotiating such a side agreement, however, in no way implicates Gold Kist. Indeed, in negotiating the collective bargaining agreement, Gold Kist was required only to bargain in good faith and was entitled to exercise its right under the NLRA to negotiate a contract with the most favorable possible economic terms for the Company. In negotiating the contract, Gold Kist owed no duty to Respondents. The only duties owed to Respondents by Gold Kist are those contractual duties assumed by Gold Kist in the collective bargaining agreement.

While an alleged breach of the Union's duty of fair representation in *negotiating* a collective bargaining agreement may arguably not be subject to an exhaustion requirement (*see Beriault v. Local 40, Super Cargoes & Checkers*, 501 F.2d 258 (9th Cir. 1974)), Respondents' claims here that Gold Kist breached the agreement were clearly subject to the contractual grievance and arbitration provisions. Respondents were therefore required to exhaust their contractual remedies before bringing this action. Because there is no possible breach of the agreement by Gold Kist that is excused from the exhaustion requirement, this hybrid Section 301/duty of fair representation claim cannot be maintained *even if* a separate claim based solely on the Union's breach of the duty of fair representation arising from the negotiation of the side agreement were viable.

The 1998 agreement contains a grievance and arbitration procedure that requires exhaustion of the employees' rights under the contract prior to commencement of a suit in federal court. (App. at 94a-96a.) *See Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965) (federal labor policy requires employees to use contract grievance procedure for redress); *Hayes v. Reynolds Metals Co.*, 769 F.2d 1520, 1522 (11th Cir. 1985) (same); *Samples v. Ryder Truck Lines, Inc.*, 755 F.2d 881, 885-86 (11th Cir. 1985) (same). The grievance and arbitration procedure was in full effect at all times relevant to Respondents' claims and was clearly available to resolve any claim that Gold Kist violated the collective bargaining agreement by paying employees more than the contractual wage rates, by modifying the contract without a written document, or by entering into an "individual agreement" with an employee.[2] As the district court recognized, Respondents do not even allege that they have attempted to utilize the grievance and arbitration procedure set forth in the contract. (App. at 26a.)[3]

---

[2] It should be noted that any such "individual agreement" would also constitute an unfair labor practice under Section 8(a)(5) of the NLRA. *See Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944).

[3] It is likewise important to reiterate that the driver incentive plan had been in effect over 20 years at the time the 1998 contract was negotiated. There was nothing hidden or secretive about it. Similarly, the 1998 contract was ratified by at least 11 of the 17 mill workers—several of whom are Respondents in this action. Those Respondents knowingly ratified the 1998 contract, which they knew contained no feed mill worker incentive plan (even

(continued...)

Respondents allege no facts to support any finding that the failure to exhaust contractual remedies should be excused. More specifically, they do not allege any conduct by Gold Kist that "amounts to a repudiation of those contractual procedures." *Vaca v. Sipes*, 386 U.S. 171, 185 (1967). Neither can Respondents establish that the Union wrongfully refused to process a grievance based on an asserted breach of the agreement by Gold Kist. *Id.* Finally, Respondents cannot establish that the Union breached its duty of fair representation in handling any grievance, because no grievance was even attempted. *Id.* at 186; *see also Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563-66 (1976).

Unlike in *Hines*, any alleged breach of the Union's duty of fair representation in the present case was completely unrelated to the availability or effectiveness of the contractual grievance and arbitration procedure. In *Hines*, employees who were discharged without just cause failed in their grievance as a result of inadequate and incompetent representation by their union representative. *Id.* at 558. The Court found that in such circumstances, the exhaustion requirement could be excused and an action could be maintained against both the employer and the union. The Court therefore concluded that an employer that had "played its part in precipitating this dispute" by discharging the em-

---

[3] (...continued)
though such a provision had been sought during negotiations). They thereafter failed to file any grievance over the longstanding truck driver incentive plan, and then they filed the lawsuit that is the basis for this proceeding. Those Respondents purposely bypassed the contractual grievance and arbitration procedure so they could attempt to gain through litigation what their union had been unable to achieve through good-faith collective bargaining.

ployees in alleged violation of the agreement could not insist on exhaustion of contractual grievance procedures in the face of the union's failure to perform its representational duties. *Id.* at 567-69. The Court has never held that exhaustion should be excused where a union's alleged breach of its duty of fair representation is unrelated to the presentation or processing of a grievance.

In the present case, the only alleged breach of the Union's duty of fair representation is the negotiation of the incentive plan on behalf of the drivers. There is no possible conclusion that this alleged breach of the Union's duty in any way prevented Respondents from challenging alleged contract breaches by Gold Kist in a grievance. In any event, Respondents did not even attempt to file a grievance prior to filing this action.

As the district court found, based on undisputed facts, Respondents are all aware of the contractual grievance procedure, yet none of them filed a grievance regarding any alleged breach of contract prior to commencing this suit. That this ground for seeking writ may be stated briefly should not be read to diminish its importance as a matter of federal labor policy. The NLRA provides that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for the settlement of grievance disputes . . . ." 29 U.S.C. § 173(d). This statutory policy "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960). To allow an employee to maintain a Section 301 claim without first exhausting the contractual grievance procedures "would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of em-

ployee grievances [and] 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.'" *Republic Steel*, 379 U.S. at 653 (quoting *Local 174, IBT v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962)).

Respondents' claims were properly dismissed by the district court for the reasons above.

CONCLUSION

For the foregoing reasons, Gold Kist respectfully requests that the Court grant its petition for writ of certiorari.

Dated this the 10th day of July, 2000.

D. Christopher Lauderdale
HAYNSWORTH BALDWIN
JOHNSON & GREAVES LLC
P.O. Box 10888
Greenville, SC 29603
864.271.7410
Attorney for Petitioner Gold Kist Inc.

Supreme Court, U.S.
FILED
00 52 JUL 10 2000
OFFICE OF THE CLERK

No. _____

In The
Supreme Court Of The United States

GOLD KIST INC. AND TEAMSTERS and
CHAUFFEURS UNION, LOCAL 612,
Petitioners,

v.

JIMMY HOOPER, ROBERT MCELRATH,
EZRA SANFORD, FRANK TRAVIS, FRED NICHOLS,
TROY MARCHBANKS, STEVE TURNER,
and JIMMY UPTAIN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

D. Christopher Lauderdale
(*Counsel of Record*)
Haynsworth Baldwin Johnson & Greaves LLC
P.O. Box 10888
Greenville, SC 29603
864.271.7410
Counsel for Petitioner Gold Kist Inc.

111pp

TABLE OF CONTENTS

Appendix A — Judgment of the United States Court of Appeals for the Eleventh Circuit (filed February 7, 2000; issued as mandate April 20, 2000) 1a
Appendix B — Order of the United States Court of Appeals for the Eleventh Circuit (filed February 7, 2000) 3a
Black, Circuit Judge, dissenting 7a
Appendix C — Order of Judge Inge P. Johnson, Northern District of Alabama, Southern Division (filed January 21,1999) 8a
Appendix D — Opinion of Judge Inge P. Johnson, Northern District of Alabama, Southern Division (filed January 21, 1999) 10a
Facts 11a
Discussion 14a
Standard for Summary Judgment 14a
Hybrid Section 301/Fair Representation Action 15a
Breach of Contract Claim 18a
Breach of Duty of Fair Representation Claim 21a
Failure to Exhaust Administrative Remedies 24a
Conclusion 27a
Appendix E — Order of Judge William M. Acker, Jr., Northern District of Alabama, Southern Division (filed May 8, 1998) 28a

Appendix F — Opinion of Judge William M. Acker, Jr., Northern District of Alabama, Southern Division (filed May 8, 1998) 30a
Pertinent Undisputed Facts 31a
Summary Judgment Standard 32a
Discussion 33a
Statute of Limitations 34a
Is Hooper's Claim Timely? 36a
Hooper's Claim for Punitive Damages 38a
Hooper's Claim for Mental Anguish 38a
Hooper's Claim for Attorneys' Fees 40a
Conclusion 41a
Appendix G — Order of United States Court of Appeals for the Eleventh Circuit denying petition for rehearing and petition for rehearing *en banc* (filed April 11, 2000) 42a
Appendix H — 29 USC § 158(a)(5) 44a
Appendix I — 29 USC § 158(d) 45a
Appendix J — 29 USC § 159(a) 48a
Appendix K — 29 U.S.C. § 173(d) 49a
Appendix L — 29 USC § 185 ..... 50a
Appendix M — Complaint (filed February 13, 1998) 52a
Appendix N — First Amended Complaint (filed June 15, 1998) 58a
Appendix O — Agreement between Gold Kist Inc. Jasper, Alabama Feed Mill and Teamsters And Chauffeurs Union Local No. 612. Effective: February 1, 1998 to January 31, 2001 ..... 64a

APPENDIX A

[Entered 02/07/00]

United States Court of Appeals
For the Eleventh Circuit

No. 99-6147

District Court Docket No. 98-00352-CV-J-S

JIMMY HOOPER, individually and on behalf of all other employees similarly situated, ROBERT MCELRATH, EZRA SANFORD, FRANK TRAVIS, FRED NICHOLS, TROY MARCHBANKS, STEVE TURNER, JIMMY UPTAIN,

Plaintiffs-Appellants,

versus

GOLD KIST, INC.,
LOCAL 612 CHAUFFEURS UNION,

Defendants-Appellees.

- -

Appeal from the United States District Court
for the Northern District of Alabama

- -

Before BLACK, Circuit Judge, GODBOLD and FAY, Senior Circuit Judges.

BLACK, Circuit Judge, dissented and filed and opinion.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby REVERSED;

It is FURTHER ORDERED THAT defendants-appellees pay to the plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of Court.

Entered: February 7, 2000
For the Court: Thomas K. Kahn, Clerk

By: /s/ Deputy Clerk

ISSUED AS MANDATE: APR 20, 2000

APPENDIX B

[DO NOT PUBLISH]
[02/07/00]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-6147

D.C. Docket No. 98-00352-CV-J-S

JIMMY HOOPER, individually and on behalf of all other employees similarly situated, ROBERT MCELRATH, EZRA SANFORD, FRANK TRAVIS, FRED NICHOLS, TROY MARCHBANKS, STEVE TURNER, JIMMY UPTAIN,

Plaintiffs-Appellants,

versus

GOLD KIST, INC.,
LOCAL 612 CHAUFFEURS UNION,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(February 7, 2000)

Before BLACK, Circuit Judge, GODBOLD AND FAY, Senior Circuit Judges.

PER CURIAM:

Plaintiffs-Appellants, Jimmy Hooper, Robert McElrath, Ezra Sanford, Frank Travis, Fred Nichols, Troy Marchbanks, Steve Turner, and Jimmy Uptain (feed mill employees of Gold Kist), filed suit against Defendants-Appellees, Gold Kist, Inc. and the Teamsters and Chauffeurs Union Local 612 ("Union"). The plaintiffs claimed that Gold Kist violated § 301 of the Labor Management Relations Act of 1947 (29 U.S.C. § 185) by breaching the February 1998 employment contract between Gold Kist and the Union. Plaintiffs also allege that the Union, as the exclusive bargaining agent for the employees, breached its fiduciary duty owed to all members of the union. Both Gold Kist and the Union moved for summary judgments, which were subsequently granted by the trial court. After careful review of the agreement and record, and upon hearing argument of both counsel, we reverse the summary judgment orders.

Summary judgment is appropriate only if there are no genuine issues of material fact in dispute. Fed. R. Civ. P. 56(c). A dispute about material fact exists if a reasonable jury could return a verdict in favor of the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Because a reasonable jury could find that Gold Kist breached the employment agreement and that the union breached its fiduciary duty, we reverse.

In 1998, Gold Kist negotiated an employment contract with the union.[1] However, Gold Kist also negotiated a "side agreement" with the teamster truck drivers for extra compensation outside the terms of the written contract. The mill workers claim that this "side agreement" constitutes a breach of the written contract. A reasonable jury could find that paying the drivers in excess of the contract is a breach because Article 1, Section 5 of the written agreement requires, "[t]here shall be no individual agreements between the Company [Gold Kist] and an employee in conflict with this Agreement." Furthermore, Article 1, Section 6 states that the employment contract shall supercede and replace any previous agreement and Article 27, Section 116, requires that any amendment or revision to the written contract be "approved in writing and subscribed to by all parties to this agreement." Therefore, after considering the terms of the written contract, a reasonable jury could find that Gold Kist breached the employment agreement by entering into an oral "side agreement" with the teamsters.

The feed mill employees also claim that the union breached its fiduciary duty to them when it allowed this "side agreement" which favored the teamsters. Given that the union represented both the mill workers and the drivers, it had an obligation to represent both groups fairly. A reasonable jury could conclude that the union breached its duty of fair representation by promoting and allowing a side agreement that favored the drivers. Consequently, summary judgment was not appropriate.

---

[1] The union represents both the feed mill workers and the teamster drivers.

Based on the foregoing reasons, we conclude that summary judgment was not appropriate because a reasonable jury could conclude that Gold Kist breached the terms of the written contract and that the union breached its fiduciary duty.

REVERSED.

BLACK, Circuit Judge, dissenting:

I respectfully dissent. Under a hybrid § 301/fair representation claim, Appellant must show both that Appellee Gold Kist breached the collective bargaining agreement and that Appellee Teamsters and Chauffeurs Union Local 612 (the Union) violated its duty of fair representation. *See Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519 (11th Cir. 1988). Even assuming Gold Kist did breach the collective bargaining agreement, I do not believe a reasonable jury could conclude that the Union violated its duty of fair representation. Appellant has not shown that the Union's conduct can be "fairly characterized as so far outside of a 'wide range of reasonableness,' that it is wholly 'irrational' or 'arbitrary.'" *Airline Pilots Ass'n, Int'l v. O'Neill*, 111 S. Ct. 1127, 1136, 499 U.S. 65, 78 (1991) (quoting *Ford Motor Co. v. Huffman*, 73 S. Ct. 681, 686, 345 U.S. 330, 338 (1953)). Although the "side agreement" did favor the truck drivers, Appellant has not alleged any facts to show that this was the result of a breach of duty of fair representation. *See Spellicacy v. Airline Pilots Ass'n-Int'l*, 156 F.3d 120, 129 (2d Cir. 1988). The district court therefore was correct in granting summary judgment in favor of Appellees. Appellant's proper recourse is to be found in the collective bargaining process, not the courts.

APPENDIX C

[Filed 01/21/99]

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JIMMY HOOPER, ROBERT McELRATH, EZRA SANFORD, FRANK TRAVIS, FRED NICHOLS, TROY MARCHBANKS, STEVE TURNER and JIMMY UPTAIN,

Plaintiffs,

vs. CASE NO. CV-98-J-352-S

GOLD KIST INC., TEAMSTERS AND CHAUFFEURS UNION LOCAL 612,

Defendants.

ORDER

In accordance with the memorandum opinion entered this day, the court does **ORDER** that the defendant Union's second motion for summary judgment (doc. 60) be and hereby is **GRANTED**. It is further **ORDERED** by the court that the defendant Gold Kist's motion for summary judgment is also **GRANTED**.

DONE and **ORDERED** this the 21st day of January, 1999.

/s/ INGE P. JOHNSON
UNITED STATES DISTRICT JUDGE

APPENDIX D

[Filed 01/21/99]

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JIMMY HOOPER, ROBERT McELRATH, EZRA SANFORD, FRANK TRAVIS, FRED NICHOLS, TROY MARCHBANKS, STEVE TURNER and JIMMY UPTAIN,

Plaintiffs,

vs. CASE NO. CV-98-J-352-S

GOLD KIST INC., TEAMSTERS AND CHAUFFEURS UNION LOCAL 612,

Defendants.

MEMORANDUM OPINION

Currently pending before the court are the defendant Gold Kist's motion for summary judgment (doc. 62), and the defendant Teamsters and Chauffeurs Union's (hereinafter referred to as "Union") second motion for summary judgment (doc. 60), to which the plaintiffs and defendants have filed memoranda and exhibits in support of their respective positions.

The plaintiffs allege that the defendant Gold Kist breached the collective bargaining agreement it entered with

the Union in February, 1998 by failing to adhere to the wage schedule contained in that agreement.[1] (See complaint at 3). In a related claim, the plaintiffs also allege that the Union breached its duty of fair representation by refusing to confront Gold Kist about this pay disparity. *Id.* These claims are both brought pursuant to the National Labor Relations Act, 29 U.S.C. §185(a).

FACTS

The plaintiffs are employed as laborers by defendant Gold Kist at its feed mill in Jasper, Alabama. (Brief of Gold Kist at 3). The plaintiffs are members of Teamsters Local 612, which represents the employees of the feed mill and the truck drivers. Plaintiff Hooper has worked for Gold Kist since 1984. (Complaint at 2, amended complaint at 2). At all times relevant to this lawsuit, the defendant Union served as the exclusive and recognized collective bargaining representative for all employees of the feed mill. *Id.*

The Union alleges that Gold Kist has not changed the manner in which it compensates its employees since 1988. At least since that time the collective bargaining agreements

---

[1] The plaintiffs' complaint actually alleges three separate collective bargaining agreements, from February, 1992, February, 1995 and February 1998. However, the Hon. Judge William Acker granted the defendant Union's motion to dismiss or, in the alternative, for summary judgment in part, ruling that no genuine issue of material fact exists with respect to any and all of the plaintiff's claims relating to the 1992 and 1995 collective bargaining agreements. See Order dated May 8, 1998. The plaintiffs filed an amended complaint June 17, 1998.

between the Union and Gold Kist have each included a wage schedule as "Exhibit A." (Affidavit of Wayne Fisher and Exhibits thereto.) Each of these wage schedules has included the language "[i]n addition to rates set forth in the above wage schedule, an additional ten cents (10¢) per hour will be paid to all feed mill employees in lieu of the incentive plan." (See Exhibit A to defendant Union's motion to dismiss or, in the alternative, for summary judgment filed April 8, 1998).

Plaintiffs allege that defendant Gold Kist has breached the terms of each of these contracts by paying tractor trailer drivers and truck drivers pursuant to "undisclosed terms outside the collective bargaining agreements." (Complaint at ¶ 10, amended complaint at ¶¶ 7, 10). Plaintiffs refer to this as a "verbal 'side agreement.'" Plaintiff's brief in opposition at 2. Plaintiffs further allege that the Union violated its duty to fully and fairly represent its members by entering this verbal agreement, and thus acted in bad faith. Amended complaint at ¶ 13. Plaintiffs' also state that the defendant Gold Kist's refusal to grant plaintiffs the right to negotiate, file a grievance and/or arbitrate this issue is a breach of the collective bargaining agreement. Amended complaint at ¶ 14.

On May 8, 1998, the Hon. William Acker granted summary judgment for the defendants on the plaintiffs' claims regarding contracts prior to the February, 1998 agreement because those prior agreements were expired and no longer in force. Order, May 8, 1998. Thus, this court is faced only with issues as they relate to the February, 1998 collective bargaining agreement. The same court order also dismissed the claims for mental anguish and emotional distress of plaintiff Jimmy Hopper, but not those claims of the subsequently added plaintiffs. *See* Order of July 20, 1998.

Defendant Gold Kist alleges that, in the mid-1970's, due to a strike by all employees at this feed mill including the truck drivers, Gold Kist and the Union entered an oral agreement for an incentive plan for the truck drivers. Memorandum in support of Gold Kist's motion for summary judgment at 5 (hereinafter referred to as "Gold Kist"), plaintiffs brief in opposition at 2. Pursuant to this agreement, the truck drivers can earn the hourly rate or an incentive rate, whichever is higher. Gold Kist at 5. To date, this agreement has never been reduced to writing. *Id.* While a separate incentive plan was established, also pursuant to an oral agreement, for the other feed mill employees during the same time frame, the defendants allege that the plan did not work well. Thus, in 1980, the Union, on behalf of the feed mill employees, negotiated an agreement with Gold Kist whereby these employees would give up their incentive pay in return for additional pay of ten cents an hour. *Id.* at 6. This agreement has appeared as note 2 of Appendix A, the wage schedule, in every collective bargaining agreement since 1980. *Id.* at 6-7; Union's memorandum in support at 6-7.

Before the collective bargaining agreement here at issue was entered, the topic of incentive pay was negotiated by the parties, however, no such pay plan was agreed to by the parties. Gold Kist at 9-11. All of the plaintiffs were present for the ratification vote on the contract for the current collective bargaining agreement. Only five of the 32 members of the bargaining unit present voted against acceptance of the contract as it was, without an incentive pay plan. *Id.* at 11. Thus, at least three of the plaintiffs had to have voted for acceptance of the contract without an incentive pay plan. Additionally, plaintiff Fred Nichols recommended to the feed mill employees that they vote to ratify the proposed

1998 Agreement. Union's Reply to Brief in Opposition of Plaintiffs at 5 (hereinafter referred to as "Union's Reply"), citing depo. of Nichols at 134.

DISCUSSION

The Court has read all of the motions for summary judgment, the responses thereto and all replies which were filed as well as all of the evidence and depositions filed in support of said motions. On motions for summary judgment, the court is to construe the evidence and factual inferences arising therefrom in the light most favorable to the non-moving party. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

Standard for Summary Judgment

Summary judgment can be entered on a claim only upon a showing that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The burden then shift to the nonmoving party to "go beyond the pleadings and by ... affidavits, or by the 'depositions, answers to interrogatories, and admissions on file' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324, Fed. R. Civ. Pro 56(e). The plaintiff must present "affirmative evidence' to establish

a genuine dispute of material fact in order to defeat the summary judgment motion, by showing that evidence exists upon which a finder of fact can reasonable find in its favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 251-253, 255-58 (1986).

While all evidence and factual inferences are to be viewed in a light most favorable to the nonmoving party. *Rollins v. TechSouth, Inc.* 833 F.2d 1525, 1529 (11th Cir. 1987); *Everett v. Napper* , 833 F.2d 1507, 1510 (11th Cir. 1987), "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact," *Anderson*, 477 U.S. at 248. A fact is not material unless it is an essential element of the nonmoving party's case. *Id.*

Hybrid §301/Fair Representation Action

In this action, the plaintiffs allege that Gold Kist has breached the 1998 collective bargaining agreement by paying its truck drivers at a rate greater than that established by the wage schedule attached to the contract as Exhibit A. Plaintiffs allege that this breach constitutes a violation of §301 of the Labor Management Relations Act, 29 U.S.C. §185. Amended complaint at ¶¶ 7, 10, 14. The plaintiffs also allege that because the Union has failed to address the disparity in pay rate, the Union has breached its duty of fair representation. Amended complaint at ¶ 13. Where, as here, plaintiffs allege a violation of these two distinct causes of action in the same suit, the case is commonly referred to as a "hybrid" §301/fair representation action. *Hechler v. Int'l Bhd. Of Elec. Workers, AFL-CIO*, 834 F.2d 942, 943 (11th Cir. 1987).

Plaintiffs must establish both that the company breached the collective bargaining agreement and that the union violated its duty of fair representation in order to prevail in a hybrid §301/duty of fair representation action. *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066, 109 S.Ct. 2066 (1989); *see also Hines v. Anchor Motor Freight*, 424 U.S. 554, 570-571 (1976)(stating that the plaintiff has the burden to demonstrate a breach by each of the defendants). Thus, if no breach of the duty of fair representation occurred by defendant union, then whether defendant Gold Kist breached the collective bargaining agreement cannot be reached by this court.

> Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on §301, since the employee is alleging a breach of the collective bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act. "Yet the two claims are inextricably interdependent. 'To prevail against either the company or the Union, ... [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the Union.'" *Mitchell*, 451 U.S., at 66-67, 101 S.Ct., at 1565-1566 (Stewart, J., concurring in the judgment), quoting *Hines*, 424 U.S., at 570-571, 96 S.Ct., at 1059. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both.

DelCostello v. Int'l Bhd. Of Teamsters, 462 U.S. 151, 164, 103 S.Ct. 2281, 2290 (1983).[2]

This court's role in examining whether the defendant Union breached its duty of fair representation is "highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." *Air Line Pilots Assn. Int'l v. O'Neill*, 499 U.S. 65, 78, 111 S.Ct. 127, 1135 (1991). The United States Supreme Court has recognized that:

> The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.... Variations acceptable in the discretion of bargaining representatives ... may well include differences based upon such matters as the ... nature of the work [and] the time at which it is done....

Ford Motor Co. v. Huffman, 345 U.S. 330, 338-339, 73 S.Ct. 681, 686 (1953). Recognizing this tenet, the Second Circuit Court of Appeals has stated that a "union's reasoned decision

---

[2] Although case law states that the court must dispose of the claims against the Union first in a "hybrid" action, *see e.g. United Parcel Service v. Mitchell*, 451 U.S. 56, 66-67, 101 S.Ct. 1559, 1565-66 (1981), this court finds that here, due to the plaintiffs framing of their claims, unless Gold Kist breached the contract by paying the truck drivers more than the stated rate, there can be no breach of the duty of fair representation.

to support the interests of one group of employees over the competing interests of another group does not constitute arbitrary conduct." *Spellacy v. Airline Pilots Assn.-International*, 156 F.3d 120, 129 (2nd Cir. 1988)(citations omitted). The plaintiff must establish, to prevail on its claim for violation of the Union's duty of fair representation that the Union acted in a manner that was "discriminatory, dishonest, arbitrary, or perfunctory." *Hechler*, 834 F.2d at 943 (quoting *DelCostello*, 462 U.S. at 164, 103 S.Ct. at 2290).

Breach of Contract Claim

The plaintiffs are suing the Union and their employer Gold Kist for paying a group of employees more than the contract allows. Plaintiffs allege in their amended complaint that they have lost income because the truck drivers make more money that the contract specifies. Amended complaint at ¶ 15. This court cannot find any logic in this argument. Assuming this court ordered the defendants to void their verbal contract and pay the truck drivers solely the hourly wage specified in the contract, the plaintiffs here would not earn any more money.

The wage schedule set out as Appendix A to the contract lists per hour amounts that the defendant employer must pay each particular class of employees. No where can this court find justification for the plaintiffs' proposition that paying an employee more than a required amount violates a contract, nor do plaintiffs cite any legal support for this novel contract interpretation. This court also cannot find any basis for the plaintiffs proposition that the verbal contract between Gold Kist and the truck drivers is contrary to the collective bargaining agreement.

The law in Alabama states that to establish a breach of contract, a plaintiff must establish (1) the existence of a contract; (2) performance by the plaintiff (3) defendant's failure to perform; (4) resulting damage to the plaintiff. *Southern Medical Health Systems, Inc. v. Vaughn*, 669 So.2d 98, 99 (Ala.1995)(citations omitted). Clearly, the collective bargaining agreement is a contract to which the plaintiffs have performed. However, the facts here do not lend themselves to this court finding a failure by the defendants to perform. Even if this court could find that by paying a certain group of employees greater than the hourly wage the defendant Gold Kist breached this contract, the court is still unable to find any damage to the plaintiffs from this alleged breach.[3]

The three sections of the collective bargaining agreement plaintiffs claim were breached are as follows:

> 4. The Company by this Agreement recognizes the Union as the sole and exclusive bargaining agent for all employees in the Bargaining Unit.
>
> 5. There shall be no individual agreements between the Company and an employee in conflict with this Agreement.
>
> 6. It is distinctly understood and agreed by all parties ... that any and all previous agreements whether oral

---

[3] Surely the plaintiffs are not arguing that if defendant Gold Kist decided to give all employees an additional ten cents an hour raise, over and above what is called for in the wage schedule, that this would be a breach of the contract.

> or written, by and between the Company and the Union are superseded and replaced by this Agreement.

Agreement at 1.

The plaintiffs do not allege that Gold Kist recognized some bargaining unit other than the Union. The plaintiffs also do not allege that Gold Kist entered a separate agreement, with an individual employee, in conflict with the agreement. Rather, plaintiffs want this court to hold that this section can be construed to read that the company cannot entered a verbal agreement with the Union providing additional benefits to a particular class of employees. Paragraph 5 of the agreement simply does not state this. The third paragraph in dispute, that this agreement supercedes all prior agreements, also has not been breached by Gold Kist. Nothing in this paragraph prevent the defendants from entering a new verbal agreement in conjunction with each new collective bargaining agreement.[4]

---

[4] This court has reviewed numerous cases where an opposite result was reached by the courts when reviewing a side agreement to a collective bargaining agreement. However, each of those cases were distinguish-able. Clearly, this was not a secret agreement, plaintiffs have known about the agreement for twenty years. Every contract between the parties since the 1970's has had the same verbal side agreement made between the union and Gold Kist. Nor did this case vary the provisions of the collective bargaining agreement. Finally, plaintiff did not rely on any of the cases the court reviewed which held that secret, unratified oral side agreements which lessened the employees rights constituted

(continued...)

As previously discussed, note 2 to the wage schedule states that "all feed mill employees" will be paid an additional ten cents per hour "in lieu of the incentive plan." Exhibits to plaintiffs' brief, Exhibit 2 at 23. Clearly, the parties to this contract agreed that the employees, including the plaintiffs, would earn ten cents an hour more than the wage schedule establishes in return for not having an incentive plan. The plaintiffs apparently want this court to order the defendants to renegotiate the contract that at least some of these plaintiffs voted to approve to obtain what they could not obtain through the collective bargaining process.

Breach of Duty of Fair Representation Claim

Plaintiffs argument is also troubled for another reason. In order to prove its claim that the Union breached its duty of fair representation, the plaintiffs allege that the Union had knowledge that the truck drivers are paid incentive pay when it is greater than their hourly pay. *See, e.g.,* plaintiffs' brief in opposition at 13. However, plaintiffs then state, to prove their breach of contract claim, that had "all the terms and rates of pay been properly disclosed, presented and negotiated, at issue is whether the Union would have, in good faith, properly negotiated a greater rate of pay for all employees,

---

[4] (...continued)
breaches of the collective bargaining agreements at issue in each case. *See e.g. Merk v. Jewel Food Stores*, 945 F.2d 889 (7th Cir. 1990); *Central States Southeast & Southwest Areas Pension Fund v. KraftCo., Inc.* 799 F.2d 1098 (6th Cir. 1986). In fact, the plaintiffs never alleged that the union membership failed to ratify this side agreement.

including the plaintiffs." *Id* at 20. This is quite the impossibility: Since the Union knew about the variance in the truck drivers rate of pay, it breached its duty of fair representation, but if the Union **had known** it could have negotiated a better rate of pay for plaintiffs.

The plaintiff must establish, to prevail on its claim for violation of the Union's duty of fair representation that the Union acted in a manner that was "discriminatory, dishonest, arbitrary, or perfunctory. *Hechler*, 834 F.2d at 943 (quoting *DelCostello*, 462 U.S. at 164, 103 S.Ct. at 2290); *Air Line Pilots Assn. Int'l*, 499 U.S. at 67, 111 S.Ct. at 1130. *See also Grooms v. Wiregrass Electric Cooperative, Inc.*, 877 F.Supp. 602, 610 (M.D. Ala. 1995). The court finds that the standard for whether a union has violated its duty of fair representation has not been met in this case.

The United States Supreme Court has long recognized that a union has the statutory duty to "serve the interest of all members without hostility or discrimination towards and, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Breininger v. Sheet Metal Workers Int'l*, 493 U.S. 67, 73, 110 S.Ct. 424, 429 (1989) (quoting *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 910 (1967)). Courts will consider union behavior arbitrary "only if, in the light of the factual and legal landscape at the time of the union's actions, the union' behavior is so far outside a 'wide range of reasonableness' as to be irrational." *Airline Pilots Assn., Int'l* 499 U.S. at 67, 11 S.Ct. at 1130 (internal citations omitted).

Here, the plaintiffs make the mere bald allegation that the Union somehow acted in bad faith because no incentive pay

agreement was reached. They do not allege that any set of facts which gives rise to an inference of discrimination by the Union in its negotiating separate compensation for truck drivers and non-truck drivers. Appendix A to the collective bargaining agreement, which at least some of the plaintiffs voted to adopt, clearly recognizes that different jobs are compensated at different rates. Likewise, the plaintiffs do not allege, nor can the court find any evidence that the Union acted arbitrarily. The Union has raised the issue of incentive pay for the mill employees during the negotiations leading to the current contract. Union's Reply at 3. This court can find no allegations by the plaintiffs that the Union engaged in dishonest or perfunctory behavior. The plaintiffs even raised the issue of the disparate pay agreement with the Union, as opposed to their Union Local. The International Brotherhood of Teamsters responded that, while such a compensation scheme, while possibly misguided, is not discriminatory or illegal. Exhibit 8 to plaintiffs' exhibits.

Similarly, Gold Kist alleges that incentive pay for the mill employees was attempted, however the employees were unable to earn incentive pay because this particular mill has a higher cost per ton production average than the company's average. Gold Kist at 11. Instead of an incentive plan which possibly would not allow the plaintiffs to ever earn incentive pay, the employees received a thirty cent per hour pay increase for the first year of the collective bargaining agreement, regardless of production. *Id.* Additionally, plaintiff Fred Nichols, when asked during his deposition, stated that he discussed the proposal to create and incentive or production bonus plan and the company did not agree to that proposal. Union's Reply at 3, citing to depo. of Nichols at 36. This is different from plaintiffs' allegation that the Union did

not bargain with the company regarding incentive pay. *See also* Union's memorandum in support of second motion for summary judgment at 2.

Plaintiffs also allege that the Union breached its duty of fair representation by ignoring their grievances and failing to take any action on their behalf. Plaintiffs' brief in opposition at 22. However, as discussed below, the plaintiffs undisputedly did not file a grievance regarding this collective bargaining agreement, before coming to court.

Failure to Exhaust
Administrative Remedies

Plaintiffs also allege repeatedly in their brief that they have been trying to follow the grievance procedure regarding the truck drivers incentive pay since 1979, but then state "at issue is whether a written contract disclosing the truckers higher rate of pay would have been approved by all the employees who voted." *Id.* Yet the plaintiffs have known that the trucker drivers earn more than their specified hourly rate of pay for twenty years.[5] *See e.g.* Affidavit of Marc Cain

---

[5] While plaintiffs knowledge of this verbal agreement for approximately twenty years raises a statute of limitations problem, the court finds that due to its rulings on other issues the question of whether the statute of limitations has run does not need to be addressed. Furthermore, this court finds that the statute of limitations here acts as a two edged sword against the defendants. The defendant Gold Kist states that "it has been common knowledge that the drivers receive the greater of incentive pay or their hourly rates in performing their duties. Therefore, Plaintiffs'

(continued...)

(1989 grievance; 1992 tried to negotiate feed mill incentive), and Affidavit of Fred Nichols (1975 negotiated for feed mill incentive; 1979 gave up incentive pay for additional ten cents per hour; 1980 attempted to file a grievance; since 1980 tried to negotiate wages competitive to truck drivers; 1990 spoke with Paul Tillman about filing a grievance) Exhibits to Plaintiffs brief in Opposition, Exhibit 3; (1979 grievance); *Id* at Exhibit 5 (1993 letter to Gold Kist's Vice President of Human Resources); *Id* at Exhibit 8 (1994 letter from International Brotherhood of Teamsters stating no legal claim for discrimination exists)[6].

---

[5] (...continued)
claims accrued long before the August 13, 1997, date that marks the six month statute of limitations." Brief of Gold Kist at 8. However, this defendant states in the same brief that "Gold Kist and the Union entered into this verbal side agreement after the 1998 contract was signed." *Id.* at 5. Seeing as the collective bargaining agreement itself states that all previous agreements whether oral or written, by and between the company and the Union are superseded and replaced by this Agreement, Agreement at 1, the defendants have no choice but to consider the side agreement at issue here to have been entered since this collective bargaining agreement was entered and hence, there is no statute of limitations problem.

[6] In the June, 21, 1994 letter from the International Brotherhood of Teamsters to plaintiff Fred Nichols, submitted by plaintiffs as Exhibit 8 of their Exhibits to Plaintiffs Brief in Opposition, Mark Junod, Warehouse Trade Division Representative writes "[i]n your case, the company tailored a program to all drivers. This is both legal and common. The company did not make a similar offer to non-driver employees .... However misguided, such a policy or
(continued...)

The 1998 collective bargaining agreement contains a grievance procedure and arbitration policy which requires employees to attempt to exhaust their administrative rights before filing a suit in federal court. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653, 85 S.Ct. 614, 617 (1965); *Hayes v. Reynolds Metals Co.*, 769 F.2d 1520, 1522 (11th Cir. 1985), *reh'g denied, en banc*, 782 F.2d 180 (11th Cir. 1986) and *Samples v. Ryder Truck Lines, Inc.*, 755 F.2d 881, 885-886 (11th Cir. 1985) all recognize that federal labor policy requires employees to use contract grievance procedures. Where a collective bargaining agreement contains an arbitration clause, those procedures must be exhausted before an employee files a § 301 suit. *Vaca v. Sipes*, 386 U.S. 171, 184-185, 87 S.Ct. 903, 913-914 (1967).

Plaintiffs here do not allege that they have exhausted their contractual remedies. Plaintiff Hooper's attempt to file a grievance regarding these claims occurred after this lawsuit was filed. Union's Reply at 4, citing Hooper depo. at 20. Because no grievance was filed by any of the plaintiffs until after this suit was filed, the Union could not have breached its duty of fair representation in not representing the plaintiffs in their grievance against the Union. Furthermore, the collective bargaining agreement provides that either side to a dispute may refer the matter to an impartial arbitrator. Agreement at ¶ 95-97, Exhibit 2 to Exhibits to plaintiffs' brief. The plaintiffs make no allegations that these provisions were utilized.

---

[6] (...continued)
lack thereof is not illegal."

CONCLUSION

The motion for summary judgment by defendant Gold Kist is hereby **GRANTED**. The second motion for summary judgment by defendant Union is hereby **GRANTED**.

DONE and **ORDERED** this the 21st day of January, 1999.

/s/ INGE P. JOHNSON
UNITED STATES DISTRICT JUDGE

APPENDIX E

[Filed 05/08/98]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JIMMY HOOPER, both individually and on behalf of all other employees similarly situated,	)	
Plaintiffs,	)	CIVIL ACTION
vs.	)	NO. 98-AR-0352-S
GOLD KIST, INC. and TEAMSTERS & CHAUFFEURS UNION, LOCAL 612,	)	
Defendants.	)	

ORDER

For reasons more fully set out in the memorandum opinion accompanying this order, the court **EXPRESSLY DETERMINES** that no genuine issue of material fact exists with respect to any and all of plaintiff's claims relating to the 1992 and 1995 collective bargaining agreements, his claim for punitive damages, or his claim for mental anguish and emotional distress and that defendant, Teamsters & Chauffeurs Union, Local 612 ("Union"), is entitled to judgment as a matter of law on said claims. Accordingly, it is **OR-**

DERED, ADJUDGED, and **DECREED** that the Union's motion for summary judgment is hereby **PARTIALLY GRANTED**, and the action, insofar as it asserts claims relating to the 1992 and 1995 collective bargaining agreements, a claim for punitive damages against the Union, and a claim for mental anguish and emotional distress, is **DISMISSED WITH PREJUDICE**. Except to the extent that the Union's motion for summary judgment is granted, it is **DENIED**.

DONE this 8th day of May, 1998.

/s/ WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX F

[Filed 05/08/98]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JIMMY HOOPER, both individually and on behalf of all other similarly situated employees,	)	
Plaintiffs,	)	CIVIL ACTION NO. CV-98-AR-0352-S
vs.	)	
GOLD KIST INC. and TEAMSTERS & CHAUFFEURS UNION, LOCAL 612,	)	
Defendants	)	

MEMORANDUM OPINION

The above-entitled action is now before the court on a motion to dismiss or, in the alternative, for summary judgment filed by defendant, Teamsters & Chauffeurs Union, Local 612 ("Union"), on April 8, 1998. The court entered a submission order on that same day and, thereby, deemed the Union's motion as one made pursuant to Rule 56, Fed.R.Civ.P.

Plaintiff, Jimmy Hooper ("Hooper"), alleges that defendant, Gold Kist, Inc. ("Gold Kist"), breached collective

bargaining agreements it entered with the Union in 1992, in 1995, and in early 1998 by failing to adhere to the wage schedules contained in those agreements. In a related claim, Hooper also alleges that, as a result of its refusal to confront Gold Kist about this pay disparity, the Union breached its duty of fair representation to union members. Hooper makes both allegations pursuant to section 301 of the National Labor Relations Act, 29 U.S.C. § 185(a) ("NLRA" or "§ 301"). For the reasons set out more fully below, the court concludes that the Union's motion is due to be granted in part and denied in part.

I. Pertinent Undisputed Facts

Hooper began working for Gold Kist as a laborer on October 22, 1984. Compl. at ¶ 5. He continues as an employee with Gold Kist today and works at the company's Feed Mill located in Jasper, Alabama (the "Feed Mill"). *Id.* at ¶¶ 5-6. Hooper is a member of the Union. *Id.* at ¶ 6. At all times relevant to this lawsuit, the Union served as the collective bargaining representative of all employees of the Feed Mill. *Id.*

On or about February 1, 1992, the Union entered into a collective bargaining agreement with Gold Kist on behalf of all Feed Mill employees. *Id.* at ¶ 8. This collective bargaining agreement included a wage schedule which dictated the hourly rate of pay for all Feed Mill employees, including truck drivers. *Id.* at ¶ 9. The Union entered into successive and substantially similar collective bargaining agreements with Gold Kist on or about February 1, 1995, and on or about February 1, 1998. *Id.* at ¶ 8.

According to Hooper, notwithstanding these collective bargaining agreements, Gold Kist paid, and continues to pay, its truck drivers more than is allowed under the binding wage schedules. *Id.* at ¶ 10. Hooper alleges that, "When this disparate pay rate was addressed by employees in negotiating the terms of each of the collective bargaining agreements in 1992, 1995, and 1998, both Gold Kist officers and union officers informed employees that this matter was not negotiable." *Id.* at 11. On February 13, 1998, Hooper filed this lawsuit, alleging breach of contract against Gold Kist and breach of the duty of fair representation by the Union. *Id.* at ¶ 1.

II. Summary Judgment Standard

Rule 56 states in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 56(c), Fed.R.Civ.P. In addition, the Eleventh Circuit has observed that "[s]ummary judgment is appropriate where there exists no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Turnes v. AmSouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994). The Union has invoked Rule 56.

III. Discussion

As an initial matter, the court concludes that any and all of Hooper's claims relating to the 1992 and 1995 collective bargaining agreements are due to be dismissed as a matter of law. It is well settled that "claims arising from expired collective bargaining agreements are actionable [only] as unfair labor practices." *Johnson v. Pullman, Inc.*, 845 F.2d 911, 914 (11th Cir. 1988). As a result, such claims fall with the exclusive jurisdiction of the National Labor Relations Board. *Id.* (citing *San Diego Bldgs. Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773 (1959)). In other words, "a federal court has jurisdiction over a suit for a violation of a collective bargaining agreement under § 301 only while the agreement is in force." *Id.*; *see also United Paperworkers Int'l Union v. Int'l Paper*, 920 F.2d 852, 859 (11th Cir. 1991). Therefore, given that this court is without jurisdiction over Hooper's claims regarding Gold Kist's alleged breach of the expired 1992 and 1995 collective bargaining agreements, the Union must necessarily receive summary judgment on his duty of fair representation claims relating to those agreements. *See Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519 (11th Cir. 1988) (explaining that, in hybrid § 301/fair representation action, the two claims are interdependent, and plaintiff must prove both claims to prevail), *cert. denied*, 490 U.S. 1066, 109 S. Ct. 2066 (1989). For the balance of this opinion, the court will address Hooper's claims as if they relate to the 1998 collective bargaining agreement only.

A. Statute of Limitations

As noted above, Hooper alleges that Gold Kist breached the 1998 collective bargaining agreement by paying its truck drivers at a rate greater than that established by the wage schedule contained in the labor contract. Compl. at ¶¶ 1, 7. Hooper also alleges that, because the Union failed to address this pay disparity with Gold Kist the Union breached its duty of fair representation. Compl. at ¶ 1. Where, as here, an employee combines these two distinct claims into a single lawsuit, the federal courts commonly refer to such cases as "hybrid" § 301/fair representation actions. *Hechler v. Int'l Bhd. of Elec. Workers, AFL-CIO*, 834 F.2d 942, 943 (11th Cir. 1987). Furthermore, as the Union correctly observes, the Supreme Court of the United States and other federal appellate courts have consistently held that the six-month statute of limitations found in § 10(b) of the NLRA applies in hybrid § 310/fair representation actions. *See e.g., DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 169-70, 103 S. Ct. 2281, 2293-94 (1983); *see also Parker v. Connors Steel Co.*, 885 F.2d 1510, 1519 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066, 109 S. Ct. 2066 (1989); *Rogers v. Lockheed-Georgia Co.*, 720 F.2d 1247, 1249 (11th Cir.), *cert. denied*, 469 U.S. 916, 105 S. Ct. 292 (1984).

In an attempt to circumvent the applicable six-month limitations period, Hooper argues, in essence, that this lawsuit is not a typical hybrid § 301/fair representation action. More specifically, Hooper contends that, because his complaint alleges that the Union "conspired" with Gold Kist to breach the 1998 collective bargaining agreement, this action is principally one for breach of contract. According to Hooper, this last fact makes Alabama's six-year statute of

limitations for breach of contract claims more appropriate in this case. Hooper's argument is unpersuasive for two reasons. First, all of the authority Hooper uses as support for this proposition is readily distinguishable from the instant case and, therefore, inapposite. For example, in one case he relies upon, *Garcia v. Eidal Int'l Corp.*, 808 F.2d 717 (10th Cir. 1998), the court of appeals declined to enforce the six-month limitations period only because the employer *unilaterally* repudiated the collective bargaining agreement at issue. *Id.* at 722. According to the Tenth Circuit, in such circumstances, "the labor law policies that persuaded the Court in *DelCostello* to adopt the uniform six-month statute of limitation are not applicable." *Id.* Obviously, where, as here, one alleges that his employer and union have *conspired* to breach the collective bargaining agreement, any reliance on *Garcia* to avoid the six-month limitations period is misplaced. Second, and more important, the mere fact that a union may have engaged in wrongdoing that goes beyond its alleged breach of duty does not, as Hooper suggests, obviate the applicability of the six-month limitations period in cases like this one. As one court explained:

> The claim . . . need not be a "classic" hybrid claim. *The six month limitation period is applicable whenever there is a [duty of fair representation] claim.*

Landry v. Air Line Pilots Ass'n Int'l, 901 F.2d 404, 411 (5th Cir.) (emphasis supplied), *cert. denied*, 498 U.S. 895, 111 S. Ct. 244 (1990). Given that Hooper clearly alleges that the Union breached its duty of fair representation, the court concludes that the six-month statute of limitations first announced in *DelCostello* applies with equal force in this case. Having determined the appropriate limitations period,

the court will now address whether Hooper's claim regarding the 1998 collective bargaining agreement is timely.

B. Is Hooper's Claim Timely?

Not surprisingly, the Union contends that Hooper's claim is not timely. As support for this position, the Union points to statements made both in the complaint and in affidavits submitted by Hooper which suggest that he and others were aware of the Union's refusal to confront Gold Kist about the alleged pay disparity in 1995, in 1992, and perhaps earlier. According to the Union, given that Hooper filed this lawsuit on February 13, 1998, these statements demonstrate that his claim accrued years ago, and, therefore, falls well outside of the six-month statute of limitations. This argument is not well taken.

It is well settled that "a cause of action accrues under § 301, and the statute of limitations begins to run, when in the exercise of reasonable diligence the claimant knew or should have known of the injury." *Hill v. Georgia Power Co.*, 786, F.2d 1071, 1074-75 (11th Cir. 1986). As the Eleventh Circuit has explained:

> "[T]he timeliness of the suit must be measured from the date on which the employee knew or should have known of the union's final action or the date on which the employee knew or should have known of the employer's final action, whichever occurs later . . . . By final action we mean the point where the grievance procedure was exhausted or otherwise broke down to the employee's disadvantage."

Id. at 1075 (quoting *Proudfoot v. Seafarer's Int'l Union*, 779 F.2d 1558, 1559 (11th Cir. 1986)). Generally, when a cause of action accrues is a question of fact. *Samples v. Ryder Truck Lines, Inc.*, 755 F.2d 881, 887 (11th Cir. 1985). However, "in certain instances, the issue can be resolved on a motion for summary judgment." *Hill*, 786 F.2d at 1075. At present, the instant case does not provide that opportunity.

Although the court agrees that the record evidence suggests that Hooper had knowledge that the Union would not address the alleged pay disparity when it negotiated the 1992 collective bargaining agreement, that fact has little, if any, bearing on whether his claim regarding the 1998 collective bargaining agreement is timely. The 1998 collective bargaining agreement is a separate contract, and, as such, it is unrelated to both the 1992 and 1995 collective bargaining agreements. Thus, any claim relating the 1998 collective bargaining agreement represents a separate cause of action that is distinct from any that exist, or that may have existed, vis-a-vis any prior labor contracts with Gold Kist. The appropriate question, then, is whether Hooper had knowledge that the Union would not address the alleged pay disparity in negotiating the 1998 collective bargaining agreement more than six months before he filed this lawsuit. Viewing the evidence in the light most favorable to Hooper, this court cannot say that, at present, the record unequivocally demonstrates that he had such knowledge. Accordingly, summary judgment is not appropriate on Hooper's claims regarding the 1998 collective bargaining agreement at this time. However, if, after further discovery, it becomes clear that Hooper did have such knowledge, then the court will revisit this decision. In the meanwhile, the Union can take comfort in the fact that, as a result of the court's dismissal of Hooper's claims regard-

ing the 1992 and 1995 collective bargaining agreements, Hooper will not reap any windfall in damages.

C. Hooper's Claim for Punitive Damages

In his complaint, Hooper asks the court to award punitive damages to punish the Union for its alleged breach of duty. Compl. at ¶ 16b. The Union argues that such awards are inappropriate in this circumstance. The court agrees. It is well established that, under the NLRA, punitive damages are not available against a union for breach of its duty of fair representation. *See Wilson v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., AFL-CIO*, 83 F.3d 747, 754 (6th Cir.) (citing *Int'l Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 52, 99 S. Ct. 2121, 2127 (1979)), *cert. denied*, ___ U.S. ___, 117 S. Ct. 610 (1996). Indeed, Hooper concedes this point in his response to the Union's motion for summary judgment. Accordingly, the court concludes that Hooper's claim for punitive damages against the Union is due to be dismissed.

D. Hooper's Claim for Mental Anguish

Hooper also asks this court to award him damages for mental anguish and emotional distress occasioned by the Union's alleged wrongdoing. Compl. at ¶ 16b. In response, the Union argues that, because such damages are awarded in hybrid § 301/fair representation actions only in very unusual circumstances not present here, this claim should be dismissed. This argument is well taken.

According to the First Circuit, "emotional distress damages should be awarded in fair representation suits only

in 'exceptional cases of misconduct.'" *Cantrell v. Int'l Bhd. of Elec. Workers, Local 2021*, 32 F.3d 465, 468 (10th Cir. 1994). Moreover, other federal "[c]ourts have found extreme and outrageous misconduct only in exceptional circumstances, such as where the plaintiff was subjected to 'constant chanting, jeering, and gesturing, a constant rain of nuts, bolts, and screws, intentional cigarette burns, vandalism of cars and lockers and vulgarities about his wife.'" *Id.* (citing *Bloom v. Int'l Bhd. of Teamsters, Local 468*, 752 F.2d 1312, 1315 (9th Cir. 1984). A review of Hooper's complaint reveals that he makes no such allegations, and he makes no showing of outrageous conduct on the part of the Union in defense of this claim. In the absence of any such allegations or showing, the court necessarily concludes that Hooper's claim for mental anguish and emotional distress damages are due to be dismissed. As the Union correctly observes, Hooper cannot "be allowed to casually toss in a demand for [such damages] at his Complaint's tail end, having made no allegations to support that claim." Mem. In Support of Mot. for Summ. J. at 9.

This conclusion remains unchanged despite Hooper's contention that, given the embryonic character of this proceeding, he has not had an adequate opportunity to discover facts to support his claim for mental anguish and emotional distress. Common sense suggests that where, as here, one seeks compensation for mental and emotional injuries, substantial discovery is unnecessary because, as the alleged "victim," he should have sufficient personal knowledge of the events giving rise to those injuries either to satisfy the liberal notice pleading standards or to create a jury question, unless, of course, one's purported injuries include amnesia. Indeed, this court fails to understand at all how

protracted discovery can better enable a plaintiff to recall the sort of extreme behavior that merits an award of damages for mental anguish. Therefore, as nothing in the record suggests that Hooper's memory is impaired, the mere fact that this proceeding is still in its initial phases does not preclude summary judgment on his claim for mental and emotional distress.

E. Hooper's Claim for Attorneys' Fees

Lastly, Hooper's complaint asks the court to award him attorneys' fees as a part of the prayed for relief. Compl. at ¶ 16c. Pointing to the "American Rule," the Union argues that such relief is inappropriate in the absence of specific statutory or contractual fee-shifting authority. More specifically, the Union argues that, because the NLRA does not authorize awards for attorneys' fees, this claim should be dismissed. The court disagrees.

In a very recent decision, the Sixth Circuit explained:

> In a hybrid § 301 suit, the employer and the union are liable "according to the damage caused by the fault of each." (Citation omitted.) *When a union breaches its duty of fair representation, a member can recover expenses, including attorneys' fees and costs, incurred in pursuing his claims against the employer.* (Citation omitted.) These expenses are the damages flowing from the union's breach; if the union had fulfilled its duty, the member would not have had to spend his own resources. *Therefore, these damages do not violate the traditional American Rule regarding attorneys' fees.* (Citation omitted.) The American rule

> only prevents the union member from recovering resources spent in pursing his claims against the union.

Vencl v. Int'l Union of Operating Eng'rs, Local 18, 137 F.3d 420, 426 (6th Cir. 1998) (emphasis supplied). In the absence of controlling authority to the contrary, the court finds the Sixth Circuit's reasoning to be persuasive. Consequently, with respect to Hooper's claim for attorneys' fees, the Union's motion for summary judgment is denied.

IV. Conclusion

The court will enter a separate and appropriate order in accordance with this memorandum opinion.

DONE this 8th day of May, 1998.

/s/ WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX G

[Filed 04/11/00]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-6147-HH

JIMMY HOOPER, individually and on behalf of all other employees similarly situated, ROBERT MCELRATH, EZRA SANFORD, FRANK TRAVIS, FRED NICHOLS, TROY MARCHBANKS, STEVE TURNER, JIMMY UPTAIN,

Plaintiffs-Appellants,

versus

GOLD KIST, INC.,
LOCAL 612 CHAUFFEURS UNION,

Defendants-Appellees.

- -

On Appeal from the United States District Court for the Northern District of Alabama

- -

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19_, ___ F.2d ___).

Before: BLACK, Circuit Judge GODBOLD and FAY, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Peter T. Fay
UNITED STATES CIRCUIT JUDGE

APPENDIX H

TITLE 29 - LABOR
CHAPTER 7 - LABOR-MANAGEMENT RELATIONS
SUBCHAPTER II - NATIONAL LABOR RELATIONS

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

APPENDIX I

TITLE 29 - LABOR
CHAPTER 7 - LABOR-MANAGEMENT RELATIONS
SUBCHAPTER II - NATIONAL LABOR RELATIONS

§ 158. Unfair labor practices

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsec-

tion (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

APPENDIX J

TITLE 29 - LABOR
CHAPTER 7 - LABOR-MANAGEMENT RELATIONS
SUBCHAPTER II - NATIONAL LABOR RELATIONS

29 USC Sec. 159

§ 159. Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

APPENDIX K

TITLE 29 - LABOR
CHAPTER 7 - LABOR-MANAGEMENT RELATIONS
SUBCHAPTER II - NATIONAL LABOR RELATIONS

§ 173. Unfair labor practices

(d) Use of conciliation and mediation services as last resort

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

APPENDIX L

TITLE 29 - LABOR
CHAPTER 7 - LABOR-MANAGEMENT RELATIONS
SUBCHAPTER II - NATIONAL LABOR RELATIONS

29 USC Sec. 185

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments.

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any

individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

APPENDIX M

[Filed 02/13/98]

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JIMMY HOOPER, both individually and on behalf of other employees similarly situated,	)	
Plaintiffs,	)	CIVIL ACTION NO. CV-98-AR-0352-S
v.	)	
GOLD KIST, INC.; TEAMSTERS AND CHAUFFEURS UNION LOCAL 612,	)	
Defendants.	)	

COMPLAINT

COMES NOW Jimmy Hooper, plaintiff, individually, and on behalf of all others similarly situated, by and through his attorney, K. David Sawyer and states the following Complaint against the above-named defendants, and for his cause of action alleges as follows:

1. Plaintiff Jimmy Hooper is an individual residing in the City of Parrish, State of Alabama, and brings this action against the Defendant Gold Kist, Inc. pursuant to § 301 of the Labor Management Relations Act, 1947 (29 USCA § 185), (hereinafter referred to as the Act), to recover damages for

and to obtain an injunction against the violation of three successive collective bargaining agreements; and against the Defendant Teamsters and Chauffeurs Union Local 612 for breach of its duty of fair representation owing to Plaintiff and all other employees similarly situated.

2. Jurisdiction of this action is conferred on this court by § 301 of the Act.

3. At all times hereafter mentioned, the Defendant Gold Kist, Inc., is engaged in a business affecting interstate commerce within the meaning of § 301, and within the definitions set forth in §§ 2(2) and 501(1) and (3) (29 USCA §§ 152(2), 142(1) and (2)) and maintains a Jasper, Alabama Feed Mill and its principal place of business in Atlanta, Georgia.

4. Defendant Teamsters and Chauffeur's Union Local 612 is, and was at all times hereinafter mentioned, a labor organization representing employees in an industry affecting commerce within the meaning of § 301 of the Act and within the definitions set forth in §§ 2(5) and 501(1) and (3) (29 USCA §§ 152(2), 142(1) and 3)), and maintains its principal office in Jefferson County, the City of Birmingham, State of Alabama.

5. Plaintiff was employed by Gold Kist, Inc. on October 22, 1984 as a laborer and is presently an employee of Gold Kist.

6. During all the times mentioned herein, defendant union was the collective bargaining representative of the

bargaining unit consisting of every defendant Gold Kist's Jasper Alabama Feed Mill employees, including plaintiff.

7. Plaintiff asserts that the applicable six-year Alabama statute of limitations applies as defendant Gold Kist has clearly breached the terms of each contract, including any and all terms relating to wage rates, grievance procedure and arbitration.

8. On or about February 1, 1992, on February 1, 1995, and again on or about February 1, 1998, the defendant union entered into successive collective bargaining agreements entitled "AGREEMENT between GOLD KIST, INC. JASPER, ALABAMA FEED MILL and TEAMSTERS AND CHAUFFEURS UNION LOCAL NO. 612" covering defendant Gold Kist's employees, including plaintiff.

9. Article 7 and Appendix "A" of each of the three collective bargaining agreements provided for and specifically defined the hourly rates to be paid all employees, including tractor trailer drivers and truck drivers.

10. Contrary to the provisions of each of these three collective bargaining agreements, tractor trailer drivers and truck drivers have been paid and are presently paid pursuant to undisclosed terms outside the collective bargaining agreements and thereby earn substantially more than other employees.

11. When this disparate pay rate was addressed by employees in negotiating the terms of each of the collective bargaining agreements in 1992, 1995 and 1998, both Gold

Kist officers and union officers informed employees that this matter was not negotiable.

12. The plaintiff and other employees have pursued this issue with Gold Kist and the union, but again, both Gold Kist officers and union officers have maintained and continue to assert that this disparate pay rate is not negotiable.

13. Plaintiff alleges that the defendant union, acting in bad faith and in breach of its duty of fair representation owing under the Act to plaintiff, and to all other similarly situated employees, has conspired with Gold Kist to maintain this disparate pay and to give all employees the impression that this disparate pay rate is not negotiable.

14. Gold Kist's method of paying certain employees outside the collective bargaining agreements and subsequent refusal to grant plaintiff and other employees the right to negotiate, file a grievance and/or arbitrate this issue constitutes a clear breach of each of the above collective bargaining agreements and a clear violation of the employees' collective bargaining rights pursuant to each contract.

15. As a direct and proximate result of aforementioned acts of each defendant having acted individually and/or in conspiracy together, plaintiff and numerous other similarly situated Jasper Feed Mill employees have lost and continue to lose significant income and have suffered damages, including mental anguish and emotional distress.

WHEREFORE, plaintiff prays:

a. That this Court issue an injunction restraining defendant company and/or defendant union from violating the present contract and the Jasper Feed Mill employees' collective bargaining rights;

b. That this Court command defendant Gold Kist and/or defendant union to pay to Plaintiff, and all other employees similarly situated, back-pay comparable to the past wages paid outside the 1992, 1995 and 1998 contracts to tractor trailer drivers and truck drivers; together with an award for mental anguish, emotional distress, and punitive damages, and;

c. That this Court grant plaintiff and all other employees similarly situated costs, attorney fees and such other and further relief as it may deem to be just and proper.

Dated February 13, 1998.

/s/ K. David Sawyer
Attorney for Plaintiff

PLAINTIFF DEMANDS TRIAL BY STRUCK JURY

/s/ K. David Sawyer

OF COUNSEL:

K. David Sawyer, L.L.C.
300 21st Street North
Suite 301
Birmingham, Alabama 35203
(205) 322-2331

Served upon Defendants via Certified Mail

Gold Kist, Inc.
60 Commerce Street
Suite 1100
Montgomery, Alabama 36104

Teamsters and Chauffeurs Union, Local 612
50 Bagby Drive
Homewood, Alabama 35209-3704

APPENDIX N

[Filed 06/15/98]

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JIMMY HOOPER, ROBERT McELRATH, EZRA SANFORD, FRANK TRAVIS, FRED NICHOLS TROY MARCHBANKS, STEVE TURNER and JIMMY UPTAIN	)
Plaintiffs,	) CIVIL ACTION) NO.) CV-98-AR-352-S
v.	)
GOLD KIST, INC.; TEAMSTERS AND CHAUFFEURS UNION LOCAL 612,	)
Defendants.	)

FIRST AMENDED COMPLAINT

COME NOW Plaintiffs Jimmy Hooper, Robert McElrath, Ezra Sanford, Frank Travis, Fred Nichols, Troy Marchbanks, Steve Turner, and Jimmy Uptain, by and through their attorney, K. David Sawyer and state the following First Amended Complaint against the above-named defendants:

1. Plaintiffs Jimmy Hooper, Robert McElrath, Ezra Sanford, Frank Travis, Fred Nichols, Troy Marchbanks, Steve Turner, and Jimmy Uptain are individuals residing in

the State of Alabama, and bring this action against the Defendant Gold Kist, Inc. pursuant to § 301 of the Labor Management Relations Act, 1947 (29 USCA § 185), (hereinafter referred to as the Act), to recover damages for and to obtain an injunction against the violation of collective bargaining agreement; and against the Defendant Teamsters and Chauffeurs Union Local 612 for breach of its duty of fair representation owing to Plaintiffs.

2. Jurisdiction of this action is conferred on this court by § 301 of the Act.

3. At all times hereafter mentioned, the Defendant Gold Kist, Inc., is engaged in a business affecting interstate commerce within the meaning of § 301, and within the definitions set forth in §§ 2(2) and 501(1) and (3) (29 USCA §§ 152(2), 142(1) and (2)) and maintains a Jasper, Alabama Feed Mill and its principal place of business in Atlanta, Georgia.

4. Defendant Teamsters and Chauffeur's Union Local 612 is, and was at all times hereinafter mentioned, a labor organization representing employees in an industry affecting commerce within the meaning of § 301 of the Act and within the definitions set forth in §§ 2(5) and 501(1) and (3) (29 USCA §§ 152(2), 142(1) and 3)), and maintains its principal office in Jefferson County, the City of Birmingham, State of Alabama.

5. Plaintiffs were employed by Gold Kist, Inc. in February, 1998, as a laborers and are presently employees of Gold Kist.

6. During all the times mentioned herein, defendant union was the collective bargaining representative of the bargaining unit consisting of every Gold Kist Jasper Alabama Feed Mill employee, including plaintiffs.

7. Plaintiffs assert that defendant Gold Kist has clearly breached the terms of the February, 1998, contract, including any and all terms relating to wage rates, grievance procedures and arbitration.

8. On or about February 13, 1998, the defendant union entered into a collective bargaining agreement entitled "AGREEMENT between GOLD KIST INC. JASPER, ALABAMA FEED MILL and TEAMSTERS AND CHAUFFEURS UNION LOCAL NO. 612" covering Gold Kist's employees, including plaintiffs.

9. Article 7 and Appendix "A" of the collective bargaining agreement provided for and specifically defined the hourly rates to be paid all employees, including plaintiffs, tractor trailer drivers and truck drivers.

10. Contrary to the provisions of the collective bargaining agreement, tractor trailer drivers and truck drivers have been paid and are presently paid pursuant to undisclosed terms outside the collective bargaining agreements and thereby earn substantially more than plaintiffs and other employees.

11. When this disparate pay rate was addressed by plaintiffs in negotiating the terms of the collective bargaining agreement, both Gold Kist officers and union officers informed plaintiffs and other employees that this matter was not negotiable.

12. The plaintiffs have pursued this issue with Gold Kist and the union, but again, both Gold Kist officers and union officers have maintained and continue to assert that this disparate pay rate is not negotiable.

13. Plaintiffs allege that the defendant union, acting in bad faith and in breach of its duty of fair representation owing under the Act to plaintiffs, has conspired with Gold Kist to maintain this disparate pay and to give plaintiffs the impression that this disparate pay rate is not negotiable.

14. Gold Kist's method of paying certain employees outside the collective bargaining agreement and subsequent refusal to grant plaintiffs the right to negotiate, file a grievance and/or arbitrate this issue constitutes a clear breach of the collective bargaining agreement and a clear violation of the plaintiffs' collective bargaining rights pursuant to the contract.

15. As a direct and proximate result of aforementioned acts of each defendant having acted individually and/or in conspiracy together, plaintiffs have lost and continue to lose significant income and have suffered damages, including mental anguish and emotional distress.

WHEREFORE, plaintiffs pray:

a. That this Court issue an injunction restraining defendant company and/or defendant union from violating the present contract and the Jasper Feed Mill employees' collective bargaining rights;

b. That this Court command defendant Gold Kist and/or defendant union to pay to Plaintiffs back-pay comparable to the wages paid outside the contract to tractor trailer drivers and truck drivers; together with an award for mental anguish, emotional distress, and punitive damages, and;

c. That this Court grant plaintiffs costs, attorney fees and such other and further relief as it may deem to be just and proper.

Dated June 15, 1998.

/s/ K. David Sawyer
Attorney for Plaintiff

PLAINTIFF DEMANDS TRIAL BY STRUCK JURY

/s/ K. David Sawyer

OF COUNSEL:
K. David Sawyer, L.L.C.
300 21st Street North
Suite 301
Birmingham, Alabama 35203
(205) 322-2331

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing pleading was served upon counsel for all parties as set out below, by placing a copy of same, in the United States mail, postage prepaid and properly addressed on this the 15th day of June, 1998.

Jeffrey E. Holmes, Esq.
Lange, Simpson, Robinson & Somerville, LLP
417 20th Street North
Suite 1700
Birmingham, Alabama 35203-3272

David R. Wylie, Esq.
Haynsworth Baldwin Johnson & Greaves, LLC
Post Office Box 10888
Greenville, South Carolina 29603-0888

Joe R. Whatley, Jr., Esq.
Cooper, Mitch, Crawford,
Kuykendall & Whatley, LLC
505 North 20th Street
Suite 1100
Birmingham, Alabama 35203

Lee D. Anderson, Esq.
Agee, Allen, Godwin, Morris, Laurenzi & Hamilton
631 Woodland Street
Nashville, Tennessee 37206

Samuel A. Morris, Esq.
Agee, Allen, Godwin, Morris, Laurenzi & Hamilton
200 Jefferson Avenue
Suite 1400
Memphis, Tennessee 38103

/s/ OF COUNSEL

APPENDIX O

AGREEMENT

between

GOLD KIST INC.
JASPER, ALABAMA FEED MILL

and

TEAMSTERS AND CHAUFFEURS UNION
LOCAL NO. 612

EFFECTIVE: February 1, 1998 to January 31, 2001

INDEX

ARTICLE	SUBJECT	PAGE NO.
	AGREEMENT	
1	RECOGNITION	
2	PURPOSE	
3	CHECK-OFF	
4	MANAGEMENT	
5	NO CONTRACT ASSIGNMENT	
6	PROBATIONARY PERIOD	
7	WAGE RATES	
8	HOURS OF WORK, OVERTIME	
9	HOLIDAYS	
10	SENIORITY	
11	VACATIONS	
12	LEAVES OF ABSENCE	
13	JURY PAY	
14	FUNERAL LEAVE	
15	PHYSICAL EXAMINATIONS	
16	GENERAL	
17	RETIREMENT PLAN AND HEALTH AND WELFARE PLAN	
18	GRIEVANCE PROCEDURE AND ARBITRATION	
19	SUSPENSION AND DISCHARGE	
20	NO-STRIKE-NO LOCK OUT AS LONG AS CONTRACT IS NOT VIOLATED	
20A	PROTECTION OF RIGHTS	
21	UNAUTHORIZED ACTIVITY	
22	GUARANTEED WEEKLY WAGE	
23	TRUCK DRIVER SAFETY	
24	FEED DELIVERY	

25	FAMILY & MEDICAL LEAVE ACT	
26	ACCESS TO COMPANY PROPERTY	
27	DURATION OF AGREEMENT	
APPENDIX "A"	WAGE SCHEDULE	
APPENDIX "B"	ASSIGNMENT OF DUES DEDUCTION	
APPENDIX "C"	GROUP LIFE & HOSPITAL INSURANCE	

AGREEMENT

1. THIS AGREEMENT entered into this 31st day of January, 1998, between GOLD KIST INC. as to Jasper, Alabama, Feed Mill and that MILL only (hereinafter referred to as the "Company") and TEAMSTERS LOCAL UNION NO. 612 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as the "Union"); Witnesses that:

2. When used herein: "Bargaining Unit" means the unit for collective bargaining purposes covered by the certification of the National Labor Relations Board in Case NO. 10-RC-5618 dated August 1, 1963, namely:

3. All production and maintenance employees at the Company's Jasper, Alabama, Feed Mill, including Truck Drivers of the Feed Mill, but excluding office clerical employees, buyers, salesmen, professional employees, technical employees, laboratory employees, guards and supervisors as defined in the Act.

ARTICLE 1 - RECOGNITION

4. The Company by this Agreement recognizes the Union as the sole and exclusive bargaining agent for all employees in the Bargaining Unit. The Company agrees, subject to the provisions of any law of the State of Alabama and of the United States, that any employee covered by this Agreement must become a member of the Union if their employment continues beyond forty-five (45) calendar days. The Company further agrees

that said person shall remain a member of the Union during the life of this Agreement.

5. There shall be no individual agreements between the Company and an employee in conflict with this Agreement.

6. It is distinctly understood and agreed by all parties to this Agreement that any and all previous agreements whether oral or written, by and between the Company and the Union are superseded and replaced by this Agreement.

ARTICLE 2 - PURPOSE

7. The purpose of this Agreement is to increase the effectiveness of the working and economic relationships between the Company, its employees and the Union.

8. The parties to this Agreement recognize the responsibilities mutually imposed upon them and realize that to provide maximum opportunities for continuing employment, maximum working conditions and adequate wages, the Company must be in a strong market position with respect to competition, which means that the Company must be able to produce efficiently and the lowest possible production cost consistent with fair labor standards. Accordingly, all parties to this Agreement accept responsibility and agree to assist in the attainment of the above objectives. To this end, the Union will cooperate with the Company to assure a full day's work on the part of the employee members and

will actively combat absenteeism and any other practices which would restrict and limit production. All parties to this Agreement will exercise their best efforts to improve production, eliminate waste production, conserve materials and supplies, improve the quality of products and workmanship, prevent accidents and strengthen good will between the Company and the Union and the general public.

ARTICLE 3 - CHECK-OFF

9. It is understood and agreed between the parties hereto that deductions for Union dues and initiation fees will be made from the wages of each employee who has voluntarily executed a written authorization therefore in the form attached as Appendix "B". Such deductions shall be made from the first pay check of each calendar month for such employees and the total amount deducted shall be remitted to the appropriate fiscal officer of the Union as promptly as possible, together with the list of employees on whose account such check-off is made.

ARTICLE 4 - MANAGEMENT

10. The Company shall at all times, subject to the provisions of this Agreement, have full control of matters relative to the management, personnel, and the conduct of its business. The Company shall control all its operations, the direction of its working forces, the hours of work, the methods of work, management of its plant and buildings, care and use of its machinery, the right to hire and promote employees and the right to monitor

its employees with hidden cameras anytime it unilaterally deems necessary with the exception of restrooms.

11. Any of the rights, powers, authority that the Company had prior to the signing of this Agreement are retained by the Company except those specifically abridged, delegated, granted or modified by this Agreement or any supplementary agreements that may hereafter be made.

12. Supervisors or anyone else outside the Bargaining Unit shall not perform the work of employees in the Bargaining Unit except in the case of any emergency, major breakdown or when instructing or training an employee. The Company has the right to have minor maintenance work performed by production employees up to a one-hour limit after actual work on the job has been started.

13. The Company in the exercise of its rights shall observe the provisions of this Agreement.

14. The Union and the Company agree separately and collectively that Gold Kist is an equal opportunity employer and, therefore, will not discriminate against any applicant or employees, and will ensure that they are treated equally without regard to their religion, race, color, sex, age, national origin, handicapped disabled veterans, veterans, or veterans of the Vietnam Era. This action shall include, but not be limited to, the following: Employment; upgrading or promotions, demotion or transfer; any form of recruiting; layoff or termination; callback; rates of pay or other forms of compensa-

tion; selections for training; and use of facilities. It is further agreed that both parties will fully comply with the requirements of the Americans With Disabilities Act including accommodations and reassignments as may be required under the Act which may supersede some of the terms of this agreement.

ARTICLE 5 - NO CONTRACT ASSIGNMENT

15. The Union agrees that it will not at any time assign this Agreement or any part of this Agreement to any other Union, Local or Affiliated unless it secures the written permission of the Company.

ARTICLE 6 - PROBATIONARY PERIOD

16. The Company may secure new employees from any source whatever.

17. A "probationary" employee is defined as one newly hired by the Company who has not completed their first forty-five (45) calendar days of service with the Company. After the expiration of the said forty-five (45) day period, such employees shall cease to be temporary or probationary employees, shall be entered on the seniority list, and shall rank in seniority from the date of their original hiring. During the probationary period their service may be dispensed with at the discretion of the Company and termination of their service for whatever reason shall not be subject to review of the grievance procedure.

18. "Probationary" employees shall receive five cents (5¢) per hour less than the regular straight-time hourly rate for the work performed as shown in Appendix "A" as attached hereto.

ARTICLE 7 - WAGE RATES

19. Job classifications and their applicable hourly rates are set forth in Appendix "A" as a part of this Agreement.

20. A shift differential shall be paid for all work performed on the second shift in the amount of ten cents (10¢) per hour and on the third shift in the amount of thirteen cents (13¢) per hour and such shift differential shall be used in computing overtime and premium time. This shift differential will be paid only to employees who are scheduled to work on the second and third shift.

21. Employees in any classification are expected to perform any duties to which they may be reasonably assigned.

22. All employees shall be paid their wages in full, minus authorized deductions, once each week. The day of the week designated as pay day shall be determined by the Company.

23. No payment will be made to members of either the Labor Relations or Negotiating Committees for the time spent in regularly scheduled Labor Relations Meetings or negotiation sessions.

24. Except as provided in Paragraph 25 below, an employee who is temporarily transferred to a job carrying

a base rate higher than the base rate for the employee's regular job shall receive the base rate of the job to which the employee is so transferred for all time worked on that job on that day.

25. If an employee is temporarily transferred to a job with a lower base rate, the employee's base rate shall not be reduced.

26. When it is necessary to permanently combine two or more production jobs in the interest of efficiency, the employee assigned to the combined job shall receive the highest pay rate of the jobs combined and the combined job shall be considered as a vacancy and filled in accordance with the bid procedure.

27. Paragraphs 24 and 25 above shall not apply to an employee who accepts a job in lieu of layoff nor to an employee who is promoted or demoted.

28. The Company agrees to furnish the truck driver rain gear consisting of:

    a. Raincoat
    b. Slip on Boots
    c. Rain Hat

The Company agrees to furnish aprons for welders.

It is further agreed this equipment is to be replaced as needed but under no circumstances more often than once each year. The Company agrees that Bulk Unloader will be furnished rain gear for work.

ARTICLE 8 - HOURS OF WORK, OVERTIME

29. This Article is intended only to provide a basis for calculating overtime and shall not be construed as a guarantee of or limitation upon hours per day or per week.

30. Forty (40) hours Monday through Sunday shall constitute a week's work and eight (8) hours shall constitute a day's work for the purpose of computing overtime. The work week will start at 12:01 a.m. Monday and end the same time on the following Monday. The work day will start at 12:01 a.m. one day and end the same time on the following day. Employees called in prior to their scheduled shift will be allowed to work their full normal shift. Truck drivers starting time will be 5:00 a.m. Feed Mill employees will start at 6:00 a.m.

31. All hours worked in excess of eight (8) straight-time hours per day and forty (40) straight-time hours per week will be paid at one and one-half (1 ½) times the regular hourly rate for the work performed. Unworked holidays, for which an employee receives holiday pay and which fall Monday through Friday, shall count as eight (8) hours straight-time for the purpose of computing weekly overtime pay.

32. If an employee has not had an opportunity to work forty (40) straight-time hours during Monday through Friday of a work week due to no work being available for the employee by the Company, that employee shall be compensated for all work the employee performed on Saturday of that work week at one and one-half (1 ½)

times the hourly rate of the work performed, and double time (2) for all work performed on Sunday of that work week; however, if an employee has failed to work forty (40) straight-time hours during Monday through Friday of a work week for any reason other than no work being available to the employee by the Company, the employee will be paid only at straight-time for hours worked on Saturday or Sunday until the employee has completed forty (40) straight-time hours during that work week.

33. There shall be no pyramiding of any overtime or premium pay provisions.

34. Employees shall be required to work overtime if the Company requests such overtime work. An employee will be excused from overtime work upon request if a qualified replacement can be obtained from the employees then at work. Saturday and/or Sunday work scheduled shall be posted by not later than 2:00 p.m. on Friday. However, this provision will in no way limit management's right to subsequently modify that schedule in any manner which is not in conflict with other provisions of this Agreement.

35. If an employee is scheduled to work or is called in on a day the employee is not scheduled to work and shows up for work at the appropriate starting time in good physical condition, and there is no work available, the employee shall receive a minimum of either four (4) hours work or four (4) hours pay at the applicable rate, except in the following circumstances:

36. A) If upon reporting to work a truck driver when no needed as such is offered other work the employee shall have the privilege of refusing it, however, if the employee refuses the alternative work the employee agrees to forfeit the guarantee for four (4) hours reporting pay as defined in ARTICLE 8 - 35.

    If upon reporting to work sufficient work is not available for a full Mill crew, work will be assigned on a seniority basis with refusal rights, provided there are qualified junior persons available to perform the necessary work. If the employee refuses the available work the employee agrees to forfeit the guarantee of four (4) hours reporting pay as defined in ARTICLE 8-35.

37. B) When two (2) hours' notice is given that the employee is not to report to work. Notice may be by plant posting, by telephone, letter, telegram or personal contact. It is the employee's responsibility to advise the Company of their correct address and correct telephone number, if any.

38. C) If the employee is not put to work either at the employee's own request or due to the employee's own fault or refusal to do the work assigned, or is laid off after having been put to work, either at the employee's own request or due to the employee's own fault or refusal to do the work assigned.

39. D) If there are matters beyond the control of the Company such as utilities' failure, fire, flood, storms, or

other Acts of God that interfere with the work to be performed.

40. E) If there is a strike by employees of the Company or employees of another company which interfere with the work to be performed.

41. There shall be no split shifts.

42. Employees will be granted shift preference on a six (6) month basis in accordance with their seniority. A sheet upon which all employees may indicate their shift preference will be posted each six (6) months. Such preference shall become effective at the beginning of the work week following the posting.

43. When overtime is required, those employees who shall do the work will be selected using the following procedure:

A. Overtime work to be performed on Saturday, Sunday or holidays will be assigned on the basis of qualifications and seniority. Employees so assigned will be required to perform whatever work is required.

B. During the regular work week (Monday - Friday) overtime work to be performed beyond the employees normal shift will be performed by the employee normally assigned to that job.

C. When an employee is absent for any reason (including vacation) the employees' job will be assigned to

any employee on the shift that has the qualifications to perform the work.

D. An employee that is called-in to work after the end of the employees' normal shift to return to work it will be on the basis of qualifications and seniority.

E. An employee is qualified to perform the job if they have permanently held the job or the company deems the employee qualified to perform the job.

F. In the event Saturday, Sunday or holiday is deemed to be a regular work day, which consists of a full shift, normal job assignments will prevail.

44. An employee will not be discriminated against for electing to not work overtime, but if requested to do so the employee must work up to four (4) hours overtime in any one shift unless there is a qualified junior person within the shift available, however, a truck driver will finish any run that they are on even if beyond twelve (12) hours.

45. An employee who is reassigned to general clean-up work, if requested to do so, must work up to two (2) hours overtime in any one shift.

46. Employees will be given at least one (1) hour notice when overtime is needed.

47. Employees will give at least a one (1) hour notice when they are unable to work as scheduled.

48. The Company agrees to pay an employee injured on the job a full days eight (8) hours for the day on which the employee is injured.

ARTICLE 9 - HOLIDAYS

49. The following holidays will be recognized:

New Years	Labor Day
Good Friday	Thanksgiving Day
Memorial Day	Christmas Day
Independence Day	Employee's Birthday
	*Floating Holiday

50. Each employee on the active payroll of the Company on these days will be paid eight (8) times their straight-time hourly rate of pay for each holiday if no work is performed on the holiday provided the employee has not failed to work when scheduled, unless excused, on the holiday and provided the employee worked the last scheduled day after the holiday occurred, except when the employee is on vacation. Employee will be excused for illness, in which case the Company reserves the right to have the illness, verified by a doctor. An employee may also be excused for other reasonable purposes provided such excuse is approved by the Company.

*A Floating Holiday is one selected by the employee at the convenience of the Company.

51. All work performed by an employee on New Year's Day, Good Friday, Memorial Day, Independence Day,

Labor Day, Thanksgiving Day, Christmas Day, and the employee's birthday, or the day observed as such, shall be paid at one and one-half (1 ½) times the employee's normal rate of pay for hours worked on the holidays, plus eight (8) hours pay at the employees base rate, provided that the employee works the scheduled hours on the last day before the holiday or the day observed as such, and the scheduled hours on the first day thereafter.

52. If any of the holidays fall on Sunday, the following Monday will be considered as the holiday in the administration of the pay provision of this Agreement.

ARTICLE 10 - SENIORITY

53. The term "seniority" as used herein shall mean the length of an employee's continuous service with the Company at its Jasper, Alabama, Feed Mill.

54. The term "continuous service" as used herein shall mean the employee's most recent period of unbroken seniority dating from the starting date of the employee's most recently completed probationary period.

55. An employee will lose their seniority and all rights as an employee in the event of any of the following:

A) If the employee quits.
B) If the employee is discharged.
C) If the employee does not report for work within five (5) work days after receiving notice recall. In the event that the Company is unsuccessful in person-

ally contacting an employee for recall, satisfactory notice shall be made by either telegram or registered letter to the last address which was furnished to the Company by the employee.

D) If the employee fails to return to work on the first week day following the expiration of a leave of absence.

E) If the employee has been absent from work due to a layoff for:

1) Twelve (12) consecutive months in the case of an employee with less than two (2) years seniority at the time the layoff began, or

2) Twenty-four (24) consecutive months in the case of an employee with more than two (2) years seniority at the time the layoff began.

F) The employee, while absent on account of sickness or injury, takes employment elsewhere.

G) The employee, while absent on account of leave, takes employment elsewhere.

H) If sick or injured and fails to furnish the Company with a doctor's certificate showing proof of the sickness or injury, if required.

I) The employee fails to report for work or call in giving a satisfactory explanation for such failure for three (3) consecutive scheduled work days.

56. The Company agrees in the event of a reduction in forces the affected employee shall have the option of taking the layoff or bumping the extent their seniority permits. If the employee elects to lay off, the employee

shall be called back to work when the job from which the employee was laid off is reactivated.

57. In reducing personnel because of lack of work, the employee with the least seniority shall be the first laid-off, providing the senior employees remaining are qualified to do the work required. If a senior employee has not previously bid on a job and had the opportunity to become qualified for it, the employee will have the opportunity to exercise the seniority and become qualified to avoid layoff. If an employee has already bid on a job and was found to lack the required qualifications, the employee will not be able to bid on the position to avoid layoff.

58. In the application of the seniority provision of this Article, a layoff shall be considered an interruption of employment caused by a reduction in force for more than five (5) working days.

59. Three (3) days' notice will be given to a permanent employee who is to be laid off for a period of two (2) weeks or more, provided that this paragraph shall not apply to a layoff made necessary by a strike or by reasons beyond the control of the Company. This paragraph shall not apply to an employee who has been working as a result of another employee's absence of five (5) days or more.

60. An employee on layoff will be required to leave a telephone number so the Company can contact the employee when any permanent job vacancy exists so the employee on layoff may bid on the vacancy.

If the employee does not provide a telephone number at which the employee can be reached, or if the Company and the Shop Stewards are unable to reach the employee during the two (2) working days the vacancy is open for the bid, the employee forfeits bid rights on the job.

61. Employees shall be placed on a seniority list which the Company shall prepare upon execution of this Agreement. Sickness, injury, temporary shutdown or temporary layoff shall not deprive an employee of the rights of seniority.

62. The Company agrees to furnish a copy of the seniority list to the Union covering all employees who have ninety (90) consecutive working days of continuous service. Such seniority list shall be posted on the bulletin board within a reasonable time after the execution of this Agreement.

63. In filling a new job, or any other permanent job vacancy with the exception of Maintenance Mechanics the bid procedure will be:

A) Written notice of such vacancy shall be posted for a period of two (2) working days.

B) Bid shall be written on a regular bid form signed and dated by the employee and placed in the bid box no later than the end of the two (2) day posting period.

C) Immediately upon determining the successful bidder on the basis of seniority, the Company shall notify the successful bidder of their selection.

D) The date the new job becomes effective will be listed on the posted job bid.

E) An employee, if necessary, shall be given a reasonable training period. For the intention of this Article "A reasonable training period" shall be up to:

Pellet Mill Operator	- 10 working days.
All other job classifications	- 10 working days.

F) With respect to Maintenance Mechanics, the Company reserves the right to hire any person from outside the Company because of their ability and experience but will give first consideration to employees within the Company. An announcement of job openings in this classification will be posted as a matter of information to our employees prior to filling the position.

64. With respect to truck drivers, an employee bidding for a truck driver job will be tested by the Company trucking supervisor and the decision as to the particular employee's ability to become a truck driver shall be made by the Company supervisor.

65. If an employee does not qualify on the job involved, the employee shall return to the former position without loss of seniority.

66. If an employee is assigned temporarily to a job other than the employee's bid job, a second employee will not be assigned to the employee's bid job while the employee is working on this temporary assignment, except when such assignment is the result of absenteeism.

ARTICLE 11 - VACATIONS

67. An employee who has been in the employ of the Company on the anniversary date of employment for at least one (1) year and less than two (2) years and who has worked not less than two hundred (200) days during the preceding twelve (12) month period shall receive one (1) week vacation with forty (40) hours pay at the employee's base rate.

68. An employee who has been in the employ of the Company on the anniversary date of employment for two (2) years and less than ten (10) years and who has worked two hundred (200) days during the preceding twelve (12) month period shall receive two (2) weeks' vacation with eighty (80) hours pay at the employee's base rate.

69. An employee who has been in the employ of the Company on the anniversary date of employment for ten (10) years and less than eighteen (18) years, and who has worked two hundred (200) days during the preceding twelve (12) month period shall receive three (3) weeks' vacation with one hundred and twenty (120) hours pay at the base rate. An employee who has been in the employ of the Company on the anniversary date of employment for eighteen (18) years or more, and

who has worked two hundred (200) days during the preceding twelve (12) month period shall receive four (4) weeks vacation with one hundred and sixty (160) hours pay at the employee's base rate.

70. For the purpose of determining whether an employee has complied with the two hundred (200) day work requirement set forth in the first four paragraphs of this Article, the following work days on which an employee is absent shall be considered as time worked for the purpose of such two hundred (200) days worked requirement only:

A) Work days on which an employee is necessarily absent from work due to an injury arising out of and in the course of employment with the Company.

B) Work days on which an employee is absent by reason of layoff but not more than fifty (50) days shall be so considered.

C) Work days on which an employee is absent by reason of proven sickness but not more than one hundred (100) such days shall be continued.

71. Vacations shall be granted at such times in the year as management finds most suitable, considering both the wishes of the employees, seniority of the employees, and the requirements of mill operation. Provided further, employees shall be given one (1) week's notice by the Company before their vacation period commences, and the employees shall make application for

their vacation at least one (1) week prior to the commencement of such vacation.

72. Vacations cannot be waived or allowed to accumulate from year to year but must be completed in each twelve (12) month period following the employee's anniversary date of employment.

73. Employees cannot waive their vacation and draw double pay for work during their vacation period unless in production emergencies the Company considers the services of the employee are necessary to the proper functioning of the Feed Mill. If an employee is due vacation pay and desires to work in lieu of taking time off from work with pay, the employee shall make this desire known to management. If the Company can use the employee in its operation of the feed mill or feed haul, the employee must be paid for vacation and allowed to continue working.

74. If a holiday falls during an employee's vacation period, the employee shall receive holiday pay in addition to vacation pay. Upon termination of an employee's service for any reason, vacation pay due him will be calculated as follows:

A) Prior to second anniversary - Employee will receive any vacation pay earned during the first year of employment less any vacation already taken or been paid for since the employee's first anniversary date.

B) After the employee's second anniversary - Employee will receive the vacation pay earned during

the year prior to the employee's last employment anniversary less any vacation the employee may have taken or been paid for since said date plus a pro-rata share of the annual vacation earned since last employment anniversary. Pro-rata vacation will be calculated on one-twelfth (1/12th) basis payable to the nearest month.

75. Paragraph number 74 in Article eleven (11) refers to and applies to vacation only.

76. For the purpose of determining whether an employee has complied with the two hundred (200) days work requirement specified in paragraphs 67, 68 and 69 hereof, the following work days on which an employee is absent shall be considered as time worked for the purpose of such two hundred (200) days work requirement only:

A) Work days on which an employee is necessarily absent from work due to an injury arising out of and in the course of the employee's employment with the Company.

B) Work days on which an employee is paid weekly benefits under the Company's group insurance plan: provided that the work days during the first seven (7) days of sickness shall be counted where the employee's weekly benefit payments do not commence until the eighth (8th) day of sickness.

ARTICLE 12 - LEAVE OF ABSENCE

77. Leaves of absence not to exceed thirty (30) days may be granted by the Company in writing. Any employee returning from a personal leave of more than five (5) consecutive working days must provide the Company with a minimum advance notice of twenty-four (24) hours. The above advance notice requirement shall also apply, where possible, to sick leaves of absence of five (5) or more consecutive days.

78. Leaves of absence for periods in excess of thirty (30) days without loss of seniority shall be granted by mutual consent to the parties hereto in writing. Leaves of absence without loss of seniority shall be granted to employees elected to Union office.

79. Any regular employee called for military service, or who may elect to volunteer for military service during the period the Selective Training and Service Act is in effect, shall, upon being honorably discharged, be reinstated with the Company and shall retain full rights of seniority in accordance with the provisions of the Universal Military Training and Service Act of 1951 and amendments thereto.

80. Disability Leave

A) A full-time employee shall be granted a disability leave of absence to begin at a time, prior to disability, that a doctor(s) determines that employee should no longer work. The leave will expire at

such time as the doctor(s) determines the employee may safely return work.

B) in returning to work, an employee who has been on disability leave shall be returned to the job from which that employee left.

C) When returning to work, an employee who has been on disability leave shall notify the Company as to the date the doctor(s) specify the employee may safety return to work. Notice to return to work shall be no less than five (5) working days, if the employee is on leave for three weeks or longer.

D) Pregnancy leave shall be regarded as any other illness or disability as to the application of this Article.

ARTICLE 13 - JURY PAY

81. An employee who is required to be absent from work for jury service shall receive whatever straight-time pay the employee would have otherwise received up to and including forty (40) hours in any one (1) week less the amount of jury pay which the employee received for the same period. When the above is applicable, each full day of jury service shall be credited as one (1) eight (8) hour day in the computation of overtime and each partial day of jury service shall be credited as a partial day toward overtime. To be eligible for the above payment, the employee must notify their immediate supervisor at the time of the call to jury service and

must furnish evidence of the amount of pay received for jury service.

ARTICLE 14 - FUNERAL LEAVE

82. Upon presentation of reasonable proof, an employee who loses time on scheduled work days on account of death of members of the employee's immediate family will be paid up to three (3) days (each day at eight (8) hours straight time) for working time lost as a result of making arrangements or attendance at the funeral. For the purpose of this provision, a member of an employee's immediate family is one of the following: the employee's spouse, parent, child, brother, sister, mother-in-law, father-in-law, grandmother or grandfather. This provision will not be applicable on a day when the employee is on layoff status, is on vacation, is on a leave of absence, is absent due to illness or injury, nor will the employee receive holiday pay for any holiday defined herein, during the period of absence due to a death in the immediate family as described above. The Company shall be promptly notified of absence under this provision.

ARTICLE 15 - PHYSICAL EXAMINATIONS

83. Employees shall promptly comply with all physical or mental examinations required by the Company. The Company shall pay for any such physical or mental examination required by it and will designate the doctor or doctors to perform the physical and mental examination. If a medical examination of an employee discloses a condition which, in the judgment of the Company,

renders an employee unfit for service, the employee may be removed from service, provided, however, that the employee involved may be examined by a physician selected by the employee and at the employee's expense. If the findings of the Company's physician and the employee's physician are in conflict as to the employee's physical or mental fitness to perform the work of the job from which the employee was removed, a neutral physician shall be selected by the two physicians involved to examine the employee and report the findings as to the employee's physical or mental fitness to perform the work of the job from which the employee was removed which findings shall be final.

ARTICLE 16 - GENERAL

84. Employees shall be paid weekly. Not more than seven (7) calendar days wages shall be held back.

A) Regular attendance is expected of all employees and repeated absenteeism will subject an employee to disciplinary action.

B) Employees shall be given two (2) break periods of fifteen (15) minutes each per shift. Breaks shall be taken, if possible, nearest the middle of the work period before and after lunch. An additional fifteen (15) minute break shall be given after eleven hours work.

85. A copy of this Agreement shall be posted in the Feed Mill.

86. If the Company should require employees to wear uniforms, it will bear the cost for same. In the meantime, it is understood and agreed that all employees will report for work in neat, clean clothing. If in the course of a person's job, unusual circumstances result in damage to an employee's clothing or footwear, the Company will replace apparel so damaged. "Unusual circumstances" do not include normal wear and soiling that occur in a person's daily activities.

87. If any provision of this Agreement is held invalid by operation of law or by a tribunal of competent jurisdiction or if compliance with or enforcement of any provision hereof is restrained by such tribunal pending or final determination as to its validity, the remaining provisions hereof shall not be affected thereby. If any provision hereof is so held invalid or so restrained the parties hereto, upon the request of either party hereto, will enter into negotiations for the purpose of reaching an agreement on a provision to replace the provision involved in such invalidity or restraint.

ARTICLE 17 - RETIREMENT PLAN AND HEALTH AND WELFARE PLAN

88. The Company's Retirement Plan as it applies to employees covered by this Agreement shall remain in effect for the duration of this Agreement subject to any improvements the Company may make in this plan.

89. The Company Group Health and Welfare Plan as it applies to employees covered by this Agreement shall

remain in effect for the duration of this Agreement (Appendix C).

ARTICLE 18 - GRIEVANCE PROCEDURE AND ARBITRATION

90. In the event of any dispute arising regarding the interpretation or application of any of the terms of this Agreement or any other grievance, dispute or alleged violation of this Agreement, all matters shall continue unchanged in the plan, without any interruption, pending such final adjustments and without any strikes, lockouts, interruptions to or interference with production, by the Company, the Union or its members.

91. If employees feel they have a grievance and submits such grievance to the Management within seven (7) working days after the alleged grievance occurs, an earnest effort will be made to settle the grievance as listed below. Grievances not submitted within the time limitations will be forever barred.

92. Should any grievance as herein defined arise between the Company and the Union or its members as to the meaning and application of this Agreement or the interpretation of its terms, there shall be no suspension of work by the aggrieved on account of such grievance, but an earnest effort shall be made to settle it immediately in the following manner:

93. A) Any employee who feels that they have been aggrieved shall report such grievance to the Union steward. The Steward and/or employee shall then

attempt to satisfactorily adjust the grievance with the employee's immediate supervisor.

94. B) If such attempted adjustment fails, the employee shall then submit the grievance in writing. Any grievance not reduced to writing within seven (7) days after failure of the procedures in Step One, above, shall be waived. The grievance form shall be prepared triplicate and signed by the employee; the original and second copy shall be submitted to the applicable supervisor. The third copy shall be retained by the Union.

1) The Union Labor Relations Committee and Plant Management will then attempt to settle the grievance in a labor relations meeting.

2) In the event the grievance is not satisfactorily resolved at this level within four (4) working days, the Union's Business Representative and the Plant Manager shall meet in an attempt to solve the grievance.

In the event the grievance is still unresolved after an additional four (4) working days, then:

95. C) Then Union's Business Representative, or the appointed alternate, and an Industrial Relations Representative of the Company shall attempt to resolve the matter. If no agreement is reached within ten (10) working days after its submission to this step, then either party may refer it to:

96. D) An impartial arbitrator to decide the matter, such arbitrator to be selected by mutual agreement between the Company and the Union. If no agreement can be reached, the Federal Mediation and Conciliation Service shall be asked to present a panel of seven (7) arbitrators from which the parties to this Agreement shall alternately strike names until one name remains. The last name remaining shall be appointed arbitrator. The decision of this arbitrator shall be final and binding on all parties concerned. The arbitrator shall render a decision as soon as possible after the hearings have been concluded. Each party shall pay the expense of its own representatives and witnesses called, and the expense of the arbitrator shall be shared equally.

97. E) It is understood that the arbitrator shall have authority only to act with respect to the interpretation of application of the specific provisions of this Agreement. Arbitration may not be resorted to as a substitute for negotiations provided for in this Agreement.

98. F) The Company has the right to initiate action to settle any misunderstandings, complaints, or grievances in accordance with Paragraphs 94 and 95 above.

ARTICLE 19 - SUSPENSION AND DISCHARGE

99. A grievance involving the discharge or suspension of an employee other than a probationary employee shall be handled in accordance with the grievance procedure beginning with Step Two. No grievance arising from a

discharge or suspension by the Company shall be considered unless written notice on the grievance is given to the Company within ten (10) days after the discharge or suspension occurs.

100. A probationary employee may be discharged during the probationary period without recourse.

101. No employee shall be discharged unless the employee has previously been given at least one (1) warning notice in writing by Certified Mail or in person with a copy to the Union; provided that no warning notice is necessary in the case of discharge for any of the following causes: Dishonesty, intoxication or use of alcoholic beverages while on duty, recklessness or gross negligence resulting in serious accident or substantial damage to Company property or product, use of narcotics, carrying unauthorized passengers on a vehicle. In imposing discipline on a current charge, the Company will not take into account any prior warnings which occurred more than twelve (12) months previously.

ARTICLE 20 - NO-STRIKE-NO LOCK OUT AS LONG AS CONTRACT IS NOT VIOLATED

102. The Union agrees that there shall be no strikes, walk-outs, stoppage or slowdown of work, boycotts, secondary boycotts, refusal to handle any product, picketing, sit-down strikes of any kind, sympathetic or general strikes or any other interference with any kind of operations of the Company during the time of this Agreement so long as the grievance procedure for which provisions is made herein is followed by the

Company and the Company agrees to arbitration and abides by the result of arbitration therein provided, subject to the terms and agreements provided herein.

The Company agrees that there shall be no lockout during the term of this Agreement so long as the grievance procedure for which provision is made herein is followed by the Union and agrees to arbitration and abides by the result of arbitration therein provided.

ARTICLE 20a - PROTECTION OF RIGHTS

103. Employees may not be required to pass a picket line in the performance of their duties provided such picket line has been officially recognized by the local Union or International Union. Refusal to cross such picket lines shall not be considered a violation of this Agreement.

ARTICLE 21 - UNAUTHORIZED ACTIVITY

104. In the event there is a strike or work stoppage or threatened strike or work stoppage or slowdown or threatened slowdown which has not been instigated, inspired or authorized by the Union, the Union through its officers and representatives will immediately:

A) Make every possible effort to prevent the threatened strike, work stoppage or slowdown or to end any strikes, work stoppages or slowdowns.

B) Direct the members of the Union who are employees of the Company to promptly return to their respective jobs.

C) Publicly repudiate any strike, work stoppage or slowdown if unauthorized.

105. In consideration of the performance by the Union and its representatives as outlined above, the Company agrees that the Union, its officers and agents shall not be liable to suit for damages for any breach of this Contract not instigated, inspired or authorized by the Union.

106. Employees whose work is required for plant protection or prevention of damage to equipment or materials during any shutdown shall faithfully perform such service without interference.

ARTICLE 22 - GUARANTEED WEEKLY WAGE

107. To the best of its ability, the Company will endeavor to provide, but does not guarantee forty (40) hours of work each week.

ARTICLE 23 - TRUCK DRIVER SAFETY

108. The Company agrees ladders used in connection with delivering feed to farms should be in such condition as to be considered safe and that power lines should be a safe distance from the bins into which feed is delivered. It is further agreed that if a driver reports what the driver considers a violation of either situation the

Company will investigate. If they agree with the driver, they will endeavor to have the violation corrected. If they are not successful, it is agreed they will furnish the driver a ladder to be used until the flock then in the house is finished. After which the driver will not be required to make deliveries until the violation is corrected.

ARTICLE 24 - FEED DELIVERY

109. During the life of the Contract, Gold Kist Inc. agrees to continue delivery of both:

A) Feed used within Gold Kist Grow-Out operations other than feed being transferred between farms:

B) All other feed except hog feed presently purchased by large users accounts as long as such buyers continue purchasing from Gold Kist and as long as they continue satisfied with present delivery arrangements:

by means of trucking under the operation and supervision of Gold Kist Inc.

ARTICLE 25 - FAMILY MEDICAL LEAVE

110. Section 1. Eligible employees will be granted up to twelve (12) weeks of unpaid leave for their own serious illness, the birth or adoption of a child, or the care of a seriously ill child, spouse, or parent.

Section 2. Employees must be employed for at least one year and have worked at least 1,250 hours within the previous twelve (12) month period.

Section 3. Employees must exhaust all paid vacation or other paid leave before taking family leave. This paid time will be counted toward the twelve (12) weeks available for family leave.

Section 4. Employees shall immediately return to work upon termination of family leave. Failure to do so shall constitute termination of employment.

Section 5. An employee who has been granted family leave shall be considered as having quit without notice if while on family leave the employee engages in or applies for other employment.

Section 6. An employee who has obtained a family leave through fraud or misrepresentation shall be subject to discharge at the sole discretion of management.

Section 7. In the case of leave for birth or placement of a child, an employee must provide thirty (30) days advance notice before the date on which the leave would begin.

Section 8. Employees will be required to provide certification, acceptable to the company, of a serious health condition for their own condition or that of a family member. The employee must provide such certification to the company prior to the beginning of

the leave or in case of emergency within one (1) week of the beginning of the leave. The certification must include the date on which the serious health condition in question begins; the probable duration of the condition, appropriate facts regarding the condition; a statement that the employee is needed to care for a spouse, parent, or child (along with an estimate of the time required), or that the employee is unable to perform his or her job duties.

Section 9. The company may require subsequent recertification on a reasonable basis.

Section 10. After the leave period is completed the employee will return to either the same job or a job equivalent in pay.

ARTICLE 26 - ACCESS TO COMPANY PROPERTY

111. The duly authorized business representative of the Union shall have access to the mill at a reasonable time when request for permission has been made to the Management.

ARTICLE 27 - DURATION OF AGREEMENT

112. This Agreement is effective February 1, 1998 and shall remain in full force and effect through January 31, 2001 and from year to year thereafter, unless amended or terminated as herein provided.

113. Either party hereto may move to amend or terminate this Agreement on February 1, 2001 or at the end of any

yearly period thereafter, by giving written notice to the other party sixty (60) days prior to the desired date of amendment or termination.

114. In the event either party hereto given written notice to the other party of intention to amend this Agreement, said notice shall contain the matter of proposed amendment or amendments and negotiations shall begin at least thirty (30) days before the expiration date (subject to waiver by either party).

115. All amendments agreed upon as part of Contract negotiations prior to February 1st of any year shall be effective as of February 1st of that year. Any amendments agreed upon as part of Contract negotiations after February 1st shall be retroactive only for period not to exceed sixty (60) days.

116. This Agreement may be amended or revised in any of its provisions at any time during its existence, provided such amendments or revisions are approved in writing and subscribed to by all parties to this Agreement.

/s/ TEAMSTERS LOCAL UNION 612

/s/ GOLD KIST INC., JASPER, ALABAMA FEED MILL

APPENDIX "A"
WAGE SCHEDULE

	Effective 1/26/98 (30¢)	Effective 2/1/99 (25¢)	Effective 1/31/00 (25¢)
Mechanic Specialist	$11.64	$11.89	$12.14
Maintenance Specialist	11.10	11.35	11.60
First Class Maintenance Man Production	10.80	11.05	11.30
Maintenance First Class	10.64	10.89	11.14
Maintenance Second Class	10.39	10.64	10.89
Utility	10.24	10.49	10.74
Tractor Trailer Driver	10.20	10.45	10.70
Pellet Mill Operator	10.09	10.34	10.59
Truck Driver	10.09	10.34	10.59
Bulk Scale Loader	10.04	10.29	10.54
Unloader	10.04	10.29	10.54
Laborer	9.84	10.09	10.34

1. Employees assigned as maintenance first class and second class in the feed mill and truck garage shall receive ten cents (10¢) per hour more than the amount designated in the above wage schedule as a tool allowance.

2. In addition to rates set forth in the above wage schedule, an additional ten cents (10¢) per hour will be paid to all feed mill employees in lieu of the incentive plan.

APPENDIX "B"
ASSIGNMENT OF DUES DEDUCTION

I, the undersigned, an employee of the _____ do hereby authorize the Teamsters Local Union No. 612, to place my name on the membership check-off and the Company shall deduct from my earnings all dues, (application fees, fines and assessments) owed to the Local Union of said check-off and turn same over to the proper officials of the Union.

This Authorization is irrevocable for the tenure of the Union Agreement with the above named Company and if not revoked by myself on or before the expiration date of the Union Agreement then this Authorization will continue thereafter, from year to year unless I give written notice of revocation to my Employer and the Union, on or before the Annual Date of Expiration of the Agreement, thereafter, which is my legal right if I so desire.

SIGNATURE_____ DATE_____

WITNESS_____

APPENDIX "C"
GROUP LIFE & HOSPITAL INSURANCE

The Company and employees agree to pay premiums for the following coverage:

1.	Life Insurance and Accidental Death & Dismemberment	$ 5,000.00
	Dependent Life - Wife	1,000.00
	- Each Eligible Child	500.00
2.	Hospital Expense -	
	Room and Board (max 70 days)	Semi-Private
	Other Hospital Expense (max)	700.00
3.	Maternity Expense -	
	Obstetrical (max)	200.00
4.	Surgical Expense (max)	500.00
5.	Doctors Calls (in hospital only) (per day)	7.50
6.	Major Medical (75% after 1st $150.00)	400,000.00
8.	X-Ray and Lab (Outpatient) (annual max)	$50/$50

In the event of layoff, an employee may continue hospitalization insurance for a maximum period of six (6) months provided they pay 100% of the premium in advance on a monthly basis.

EMPLOYEE MONTHLY CONTRIBUTIONS

Employee Only	Employee & Family
Effective 2/1/98 - $25.00	$58.00

WEEKLY SICKNESS AND ACCIDENT BENEFIT
(PAYROLL BENEFIT) $80.00

Maximum of thirteen (13) weeks after first (1st) day accident and seventh (7th) day sickness, except for cases covered by Worker's Compensation.

Employees hired on or after February 1, 2000, will be eligible for sickness and accident benefits after one (1) year of employment.

(3)

No. 00-52

Supreme Court, U.S.
FILED
AUG 30 2000
CLERK

In The

Supreme Court of the United States

GOLD KIST, INC. and TEAMSTERS and CHAUFFEURS UNION, LOCAL 612,

Petitioners,

v.

JIMMY HOOPER, ROBERT McELRATH, EZRA SANFORD, FRANK TRAVIS, FRED NICHOLS, TROY MARCHBANKS, STEVE TURNER, and JIMMY UPTAIN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JULIAN L. MCPHILLIPS, JR.
Counsel of Record
MCPHILLIPS, SHINBAUM AND GILL
P.O. Box 64
Montgomery, Alabama 36101-0000
(334) 262-1911

K. DAVID SAWYER
K. DAVID SAWYER, L.L.C.
2017 Morris Avenue
The Douglass Building
Birmingham, Alabama 35203
(205) 322-2331

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

21pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

HISTORY OF VERBAL SIDE AGREEMENTS 2

THE 1998 CONTRACT 6

LAW AND ARGUMENT 8

I. GOLD KIST'S BREACH OF THE COLLECTIVE BARGAINING AGREEMENT 8

II. UNION BREACH OF DUTY OF FAIR REPRESENTATION 13

III. RESPONDENTS EXHAUSTED THEIR CONTRACTUAL REMEDIES 15

IV. CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Air Line Pilots Ass'n v. O'Neill, 11 S.Ct. 1127 (1991) 14

Diaz v. Schwerman Trucking Company, 709 F.2d 1371 (11th Cir. 1983) 8

Harris v. Schwerman Trucking Company, 668 F.2d 1204 (11th Cir. 1982) 14

Hayes v. Renolds Metals Company, 769 F.2d 1520 (11th Cir. 1985) 15

International Brotherhood of Electrical Workers v. Foust, 99 S.Ct. 2121 (1979) 13

Kidder v. AmSOUTH Bank, N.A., 639 So. 2d 1361 (Ala. 1994) 10

Merk v. Jewel Food Stores Division of Jewel Companies, Incorporated, et al., 945 F.2d 889 (7th Cir. 1991), cert. denied, 112 S.Ct. 1951 (1992) 11, 12

Parker v. Connors Steel Company, 855 F.2d 1510 (11th Cir. 1988) (Reh. denied, 1988) 14

Southern Medical Health Systems, Inc. v. Vaughn, 669 So. 2d 98 (Ala. 1995) 9

Tedford v. Peabody Coal Co., 533 F.2d 952 (5th Cir. 1976) 14

Vaca v. Sipes, 87 S.Ct. 903 (1967) 14, 15

STATUTES

§ 301 of the Labor Management Relations Act, 1947 (29 USCA § 185) .... *passim*

INTRODUCTION

This hybrid action was brought by eight mill workers employed by Gold Kist, Inc. (Gold Kist) at its Jasper Feed Mill pursuant to § 301 of the Labor Management Relations Act of 1947. Each Respondent alleged that Gold Kist breached the terms of the February 1998 contract entered into between Gold Kist and Teamsters and Chauffeurs Union, Local 612 (the Union). They further alleged that the Union, as their exclusive bargaining agent, breached its duty of good faith owed to them and all Union members.

The Petitioners, in their Petition to this Court, again attempt to divert the Court's attention away from the focal issue of the suit by arguing that the mill workers were unable to negotiate "incentive pay."

This suit, as stated and repeatedly argued by the Respondents in the Courts below, concerns a verbal "side agreement" entered into by Gold Kist and the Union in 1998 that expressly violates the terms of the written contract. By entering into this verbal "side agreement," Gold Kist breached the terms of the 1998 written contract, and the Union breached its duty to fully and fairly represent its members, including each of the named Respondents.

STATEMENT OF THE CASE

The Respondents brought suit against Gold Kist pursuant to § 301 of the Labor Management Relations Act, 1947 (29 USCA § 185), to recover damages for and to obtain an injunction against the violation of the 1998

collective written bargaining agreement, and against the Union for breach of its duty of fair representation owed to the named Respondents.

The District Court granted summary judgment in favor of Gold Kist and the Union. The Respondents appealed to the Eleventh Circuit. The Eleventh Circuit, after hearing oral argument, reversed the District Court's ruling, holding that a jury question exists as to whether Gold Kist breached the terms of the 1998 wage agreement, and whether the Union breached its duty of good faith in representing its members.

STATEMENT OF FACTS

The Petitioners have briefly stated what it considers the history of the Jasper Feed Mill. Accordingly, the Respondents find it necessary to address the long history of how Gold Kist and the Union have not only ignored and breached the terms of the 1998 agreement, but also how they have ignored the written terms of the previous contracts.

HISTORY OF VERBAL SIDE AGREEMENTS

In 1973, Gold Kist entered into an agreement with the Union to end a strike at its Jasper Feed Mill. The truck drivers had the controlling vote, and accordingly, the company offered to the truck drivers an incentive plan (additional pay for tonnage and mileage) and the feed mill employees came back to work with no gain

whatsoever. The way Gold Kist has paid the truck drivers contrary to feed mill employees, and by a verbal ***"side agreement"*** contrary to the terms of *each* contract since that time, has never been part of any three-year contract negotiations, nor contained in the terms of any actual contract entered into between the Union and Gold Kist.

In 1979, the feed mill employees filed a grievance regarding the way truck drivers are paid ***"outside"*** the contract. This grievance was never addressed. The Union has never agreed to pursue such a grievance with the response that this unwritten "side agreement" between Gold Kist and the Union is not negotiable.

Feed mill employees have long asked that any pay rates of *all* employees be included in their contracts so that employees would know what they are in fact agreeing to. These requests have been deleted, never pursued, and not negotiated.

In approximately 1989, Respondents Fred Nichols and another feed mill employee, Marc Cain, presented to Charles Parrish a grievance regarding the pay received by the truck drivers outside, and contrary to, the terms of the 1989 contract. According to Respondent Nichols, he and Marc Cain presented the grievance to Mr. Parrish and he would not accept it.

In 1992, Marc Cain asked the Union and company to write into the contract the way the truck drivers were really paid. The Union and company informed him that it was not a negotiable item. Respondent Nichols further spoke directly to the Union Business Agent, Paul Tillman,

regarding the way the truckers were paid in direct contradiction to the terms of the negotiated contract. Paul Tillman informed him that he was not going to accept such a grievance and that Mr. Nichols was wasting his time and that filing such a grievance would be just like throwing it in the garbage. This practice has been ongoing for many years pursuant to an undisclosed verbal side agreement between Gold Kist and the Union.

Marc Cain also filed a grievance against the unequal pay of truck drivers outside, above and contrary to the terms of the contract. All feed mill employees signed the grievance. Respondents Nichols and Marc Cain presented a grievance to Charles Parrish, the plant manager. Charles Parrish immediately handed it back to them and said that he was not going to accept the grievance, and that they did not have a grievance. Respondents Nichols and Marc Cain then mailed a copy of the grievance to Paul Tillman, the Union business agent. Several days later, Paul Tillman informed Respondents Nichols and Marc Cain that they did not have a grievance, and that the way the truck drivers were paid outside, above and contrary to the terms of the contract was not a negotiable item.

On October 11, 1993, the employees at the Jasper Feed Mill wrote to Mr. William A. Epperson, Vice President of Human Resources for Gold Kist. In that letter, the feed mill employees wrote that they were being discriminated against by not being given an equal opportunity for wages and benefits.

Respondents Nichols and others sent a similar letter dated January 10, 1994, addressing the fact that some employees, namely truck drivers, were being paid contrary to the terms of the contract. Mr. Epperson

responded that the Company found no evidence of unfair treatment, discrimination, or that the labor contract was being violated, and that he believed that Gold Kist was not violating any state or Federal law nor any regulations of the agencies mentioned in the letter. Of great interest, Mr. Epperson of Gold Kist stated that the Company was not free to change any terms and conditions of the labor contract, the very act by which the Respondents had filed their grievance.

The International Brotherhood of Teamsters wrote to the Respondents on June 21, 1994, and stated that the drivers receive incentive pay based upon mileage and tonnage and bonus pay for accident-free driving, while the other employees receive no bonuses, and that while such a practice on its face appeared discriminatory, it did not constitute a legal claim for discrimination.

In 1997, Union representative Larry Gilcrest informed Respondent Nichols that the unequal pay of the truck drivers outside the contract terms was not proper. However, Union business agent, Wayne Fisher, immediately informed Larry Gilcrest to be quiet, and that the unequal pay of the truck drivers outside, above and contrary to the terms of the contract was not negotiable. Union agent, Wayne Fisher, further asserted that the wage schedule was a minimum wage and that the company can pay any amount of money over that wage schedule. Respondent Nichols further noted that Larry Gilcrest visited him in the hospital in early 1998, and asked him to resign as Union steward because he was causing too much conflict.

THE 1998 CONTRACT

Gold Kist negotiated the present 1998 written contract with the Union beginning in January, 1998. Gold Kist also negotiated and entered into an undisclosed verbal "understanding" with the Union regarding the truck drivers pay *in excess of the terms of the written contract.*

As stated by Bruce Crawford, Gold Kist's Manager of Labor Relations, this practice of paying the truck drivers in excess of the written contract terms was again agreed upon by Gold Kist and the Union in direct contradiction to the terms of the 1998 contract. Nothing was ever placed on the negotiation table by which ***all*** employees subject to the contract could read and understand the terms by which only certain employees would earn income outside the contract terms.

In fact, Gold Kist has admitted that the way the truckers are paid is a ***verbal side agreement that's unwritten with the Teamsters***. Moreover, neither Gold Kist nor the Union have ever given the Respondents or the Courts a valid basis for not including the terms by which the truckers are paid in the 1998 three-year written agreement. According to Gold Kist, the Company and Union just wanted to keep it outside the terms of the contract. The Respondents were not informed of the terms of the verbal side agreement, nor invited to the secret meeting at which the separate terms were agreed upon.

These facts, alone, clearly reveal that Gold Kist and the Union together have developed a pattern by which they can avoid negotiating with all Union members, thereby satisfying certain employees by paying them

more than twice their hourly rate of pay through a verbal side agreement. The Respondents were left attempting to correct this unequal method of pay, without proper negotiations and without a grievance procedure. The verbal side agreement entered into between Gold Kist and the Union in 1998 is the essential subject of the Respondents' Complaint.

The 1998 agreement specifically states that the "Bargaining Unit" represented by the Union includes all production and maintenance employees at the Company's Jasper, Alabama, Feed Mill, including truckers. Gold Kist recognizes the Union as the sole and exclusive bargaining agent of **all employees** in the Bargaining Unit, and further, specifically states that there shall be **no individual agreements** between the Company and an employee in conflict with the agreement. The 1998 agreement makes no reference to truckers being paid in excess of the hourly wage rates contained in the agreement.

Charles Parrish, Gold Kist's Feed Mill Manager, has further testified that during the past five (5) years, neither the Union nor any of its officers have asked Gold Kist to enter into a separate side agreement with the Respondents, whereby they could similarly earn two to three times more than the wage rates contained in the negotiated contracts.

What is essentially important is that after the 1998 written contract was signed establishing hourly wages for all employees, Gold Kist and the Union then entered into their verbal side agreement whereby the truck drivers would be paid in excess of the written contract terms. After learning this, Respondent Jimmy Hooper attempted

to file a written grievance asserting that the truck drivers were being paid contrary to the terms of the 1998 contract. He submitted the grievance to his immediate supervisor, who forwarded the grievance to the Feed Mill Manager. As with the other grievances, the grievance was summarily rejected.

The Union is well aware of the verbal side agreement and, as a clear breach of its duty to represent its members, has taken no action on behalf of the Respondents. To reiterate, Gold Kist and the Union entered into a separate verbal agreement whereby the truck drivers of the Jasper plant would earn in excess of the negotiated hourly rate established in the written contract. As decided by the Eleventh Circuit, there exist jury questions as to (1) whether Gold Kist has breached the terms of the 1998 contract; and (2) whether the Union has breached its fiduciary duty to equally represent its members.

LAW AND ARGUMENT

I. GOLD KIST'S BREACH OF THE COLLECTIVE BARGAINING AGREEMENT

The Respondents acknowledge that to prevail against either Gold Kist or the Union, the employees must show that Gold Kist breached the 1998 contract and that the Union breached its duty of fair representation. *Diaz v. Schwerman Trucking Company*, 709 F.2d 1371 (11th Cir. 1983).

In Alabama, the elements for breach of contract are: (1) existence of a contract; (2) performance by the plaintiff; (3) defendant's failure to perform; and (4) resulting damage to the plaintiff. *Southern Medical Health Systems, Inc. v. Vaughn*, 669 So. 2d 98, 99 (Ala. 1995). In the present action, Gold Kist has explicitly breached the terms of the 1998 Contract. Gold Kist has admittedly entered into a separate, secret verbal agreement with the Union regarding the truckers' pay that directly conflicts with the terms of the 1998 written agreement. Gold Kist admittedly refused to include this secret, separate "side agreement" in the contract purportedly negotiated for ***all*** employees. Gold Kist refused to negotiate the terms of this "side agreement" when negotiating the terms of the contract for ***all*** employees. Finally, after the employees attempted to contest this "side agreement" by following the terms of the contract, Gold Kist followed its historical pattern and refused to accept the grievance.

Gold Kist argues that the Respondents receive in pay what the written contract states. What Gold Kist ignores is that the truck drivers are ***not*** paid pursuant to the written contract. This contract was supposedly negotiated and binding on ***all*** parties, including the truck drivers, who are paid an amount in great excess of the contract terms. Had the truck drivers' actual secret rate of pay been included in the written contract, the mill workers most certainly would have asked the Union, their exclusive bargaining agent, to negotiate for a better hourly rate.

Essentially, Gold Kist and the Union fraudulently induced the signing of the written contract by including terms that they did not intend to follow, and have only

partially performed pursuant to the contract, by separately and verbally agreeing to pay certain workers governed by the contract an amount substantially exceeding the contract terms.

The terms of the written contract state:

(1) The Union is the sole and exclusive bargaining agent of all employees in the Bargaining Unit;

(2) There shall be no individual agreements between the Company and an employee in conflict with this agreement;

(3) Any and all previous agreements whether oral or written, by and between the Company and the Union are superseded and replaced by this agreement; and

(4) Any amendment or revision to the written contract must be approved in writing and subscribed to by all parties to this agreement.

As the facts illustrate above, Gold Kist has breached each of these terms of the contract by entering into a separate verbal agreement with the Union, for the benefit of only a certain number of employees and to the detriment of others, including the named Respondents.

Moreover, Gold Kist's breach is similar to "fraud in the inducement." The elements of fraud are: (1) a duty to speak the truth; (2) a false representation of a material, existing fact made intentionally, recklessly, or innocently; (3) action upon the false representation by the plaintiff; and (4) loss, harm, or damage proximately resulting from the false representation. *Kidder v. AmSOUTH Bank, N.A.*, 639 So. 2d 1361 (Ala. 1994).

Gold Kist represented, in negotiating and signing the 1998 written contract, the hourly wages of *all* employees. Thereafter, Gold Kist entered into a separate verbal agreement with the truckers by which they would earn exceedingly more than the hourly rate. Again, had all terms and rates of pay been properly disclosed, presented and negotiated, at issue is whether the Union would have, in good faith, properly negotiated a greater rate of pay for all employees, including the Respondents. Also at issue is whether a written contract disclosing the truckers' higher rate of pay would have been approved by all employees who voted.

Again, neither the Respondents nor the Union membership were ever given notice of the secret verbal agreement to double the truck drivers' pay, much less an opportunity to negotiate. A case cited, but incorrectly applied by the district court is found in the Seventh Circuit. In *Merk v. Jewel Food Stores Division of Jewel Companies, Incorporated, et al.*, 945 F.2d 889 (7th Cir. 1991), cert. denied, 112 S.Ct. 1951 (1992), the Appellate Court held that a secret verbal agreement between the Union and employer was not enforceable. The Union and company secretly and orally agreed to modify wage terms of the collective bargaining agreement. Reversing the district court's ruling that allowed the secret verbal agreement, the Seventh Circuit reversed holding that "grave dangers" are created by a backroom deal that is secretly negotiated between Union officials and company management without the knowledge or consent of the Union rank and file.

While acknowledging the right of the parties to verbally agree to "consistent additional terms," the Seventh

Circuit continued by addressing the issue of "whether national labor policy allows enforcement of a clandestine oral side agreement that alters fundamental terms of the written and ratified collective bargaining agreement." 945 F.2d 889, 893.

Finding that this method of altering and adding terms to a collective bargaining agreement is not proper, the Seventh Circuit held as follows:

> "[T]he laws regulating labor relations would have little substance if the central provisions of the collective compact could be nullified by means of secret side agreements. Union officials and management would then be free quietly to barter away basic guarantees contained in the collective bargaining agreement and relied upon by all union members.
>
> . . . . Accordingly, we hold that national labor policy forbids introduction of prior or contemporaneous secret agreements to contradict fundamental terms of a ratified collective bargaining contract."

945 F.2d 889, 894. The United States Supreme Court denied certiorari.

This is specifically the issue ignored by the district court, and the basis for the Eleventh Circuit's reversal.

As the Eleventh Circuit determined: A reasonable jury could find that paying the drivers in excess of the contract is a breach of the following contract terms:

(1) That there shall be no individual agreements between the Company and an employee in conflict with this agreement;

(2) That any and all previous agreements whether oral or written, by and between the Company and the Union are superseded and replaced by this agreement; and

(3) That any amendment or revision to the written contract must be approved in writing and subscribed to by all parties to this agreement.

Under the present circumstances, the Respondents contend that they are entitled to wages paid in direct correlation to those paid to the truck drivers pursuant to the separate, verbal side agreement.

II. UNION BREACH OF DUTY OF FAIR REPRESENTATION

The United States Supreme Court has broadly characterized the Union's duty of fair representation:

> "Under the doctrine, a union must represent fairly the interests of **all** bargaining-unit members during the **negotiation, administration, and enforcement** of collective-bargaining agreements."

International Brotherhood of Electrical Workers v. Foust, 99 S.Ct. 2121, 2125 (1979) (Emphasis added).

In the context of the grievance process, in order to establish that the Union has breached its duty of fair representation, the employee must show that the Union's handling of the grievance was either arbitrary, discriminatory, or done in bad faith. The duty of fair representation is breached when a Union's treatment of an employee's complaint is arbitrary, discriminatory, or in

bad faith. *Vaca v. Sipes*, 87 S.Ct. 903, 909 (1967). An example would be when a Union arbitrarily ignores a meritorious grievance or is perfunctory in its procession of the grievance. *Harris v. Schwerman Trucking Company*, 668 F.2d 1204, 1206 (11th Cir. 1982). The Court in *Harris* continued, " . . . we believe that a claim that a union acted 'perfunctorily' requires a demonstration that the union ignored the grievance, inexplicably failed to take some required step, or gave the grievance merely cursory attention." 668 F.2d at 1207.

A fair representation case may also be stated against a Union for misrepresenting the terms of an agreement to its membership. *Parker v. Connors Steel Company*, 855 F.2d 1510, 1521 (11th Cir. 1988) (Reh. denied, 1988). In order to assure that this power is not abused, an exclusive bargaining agent is under a duty to represent fairly all the employees within the appropriate bargaining unit with respect to matters arising out of the collective bargaining agreement with the company.

The Union may not take actions or make rational decisions "based upon motivations such as personal animosity or political favoritism." *Tedford v. Peabody Coal Co.*, 533 F.2d 952, 957 (5th Cir. 1976). The Union's actions must further be "inclusive of a fair and impartial consideration of the interests of ***all*** employees." Id. (Emphasis added). "[A] union['s] . . . duty of fair representation . . . applies to all union activity . . . " which derives from the Union's sole representative of its members. *Air Line Pilots Ass'n v. O'Neill*, 11 S.Ct. 1127, 1130 (1991).

In this case, not only did the Union verbally and in writing continually ignore the Respondents' grievances

and fail to take any action on their behalf. Here, the Union actively participated in misrepresenting to certain members the true terms of the contract, and then entered into a separate, secret verbal agreement with Gold Kist for the benefit of only certain employees that it represented.

Again, as the Eleventh Circuit determined: "Given that the union represented both the mill workers and the drivers, it had an obligation to represent both groups fairly. A reasonable jury could conclude that the union breached its duty of fair representation by promoting and allowing a side agreement that favored the drivers."

III. RESPONDENTS EXHAUSTED THEIR CONTRACTUAL REMEDIES

Where the collective bargaining agreement contains a grievance procedure, the aggrieved worker must ordinarily exhaust his contractual remedies before bringing suit in Federal Court. *Hayes v. Renolds Metals Company*, 769 F.2d 1520 (11th Cir. 1985). This was explained by the Eleventh Circuit as follows: "[A] cause of action for breach of the duty of fair representation accrues at the point where the grievance procedure has been exhausted **or otherwise breaks down to the employee's disadvantage**." At 1522. (Emphasis added).

In *Vaca v. Sipes*, 87 S.Ct. 903, 914 (1967), the Supreme Court held that employees may sue their employer directly for breach of a bargaining agreement if the employer has effectively repudiated the grievance and arbitration process:

> "An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the contract occurs when the conduct of the employer amounts to a repudiation of those contract procedures. (Citations omitted). In such a situation (and there may of course be others), the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action. . . . An employer's repudiation may take the form of either an express refusal to abide by contractually established grievance and arbitration machinery, . . . or conduct which renders the employer unable or apparently unable to comply."

In the instant action, the Respondents have long attempted to follow the grievance procedure regarding this very issue after each negotiated contract for nearly twenty (20) years. Both the Union and the Company have routinely responded that the issue is not an issue subject to grievance.

After entering into the present 1998 contract, Respondent Jimmy Hooper attempted to file a written grievance asserting that the truck drivers were being paid contrary to the terms of the 1998 Contract. He submitted the grievance to his immediate supervisor, R.B. Casey, who in turn forwarded it to Charles Parrish, the Feed Mill Manager. Mr. Hooper filed the grievance with his immediate supervisor, and it was sent back to him. He filled it out on a Union grievance form and never did get an answer. Respondent Hooper has stated: **That's as far as it ever gets.**

Certainly, when this action was filed in February, 1998, the six-month statute of limitations had not run regarding the February, 1998 contract, and the grievance procedure has certainly broken down to the employees' disadvantage. Although the Eleventh Circuit did not specifically address this issue, the facts support the Respondents' position that Gold Kist and the Union are now estopped from attempting to assert this defense.

IV. CONCLUSION

Respondents strongly assert that the Eleventh Circuit properly determined that a reasonable jury certainly could return a verdict in their favor on the two essential allegations of their Complaint:

(1) Gold Kist breached the express written terms of the February 1998 contract entered into between Gold Kist and the Union; and

(2) The Union, as the Respondents' exclusive bargaining agent, breached its duty of good faith owed to them and to all Union members in negotiating, administering and enforcing the 1998 collective bargaining agreement, and further breached its duty to properly administer the contract's grievance procedure.

For the foregoing reasons, the Respondents respectfully request that the Court deny Gold Kist's petition for writ of certiorari.

Done this the 30th day of August, 2000.

JULIAN L. MCPHILLIPS, JR.
Counsel of Record
MCPHILLIPS, SHINBAUM AND GILL
P.O. Box 64
Montgomery, Alabama 36101-0000
(334) 262-1911

K. DAVID SAWYER
K. DAVID SAWYER, L.L.C.
2017 Morris Avenue
The Douglass Building
Birmingham, Alabama 35203
(205) 322-2331

Attorneys for Respondents